

FILED
CLERK OF COURTS

2016 MAR 23 PM 1:05

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

FILED
CLERK OF COURTS
ALLEN COUNTY, OHIO

STATE OF OHIO	*	CASE NO. CR2014 0139
Plaintiff	*	
-VS-	*	TRANSCRIPT -
		JURY TRIAL
MARKELUS Q. CARTER	*	
Defendant	*	SEPTEMBER 8 - 22, 2015

A P P E A R A N C E S

The HONORABLE JEFFREY L. REED, Judge of the Court of Common Pleas of Allen County, Ohio, presiding;

TERRI L. KOHLRIESER and ANTHONY J. MILLER, Assistant Prosecuting Attorneys, Allen County, Ohio, present on behalf of the State of Ohio;

JON PAUL RION, Attorney at Law, Suite 2150, 130 West Second Street, P.O. Box 10126, Dayton, Ohio 45402, present on behalf of the defendant;

SUSAN K. THOMAS
Court Reporter
Court of Common Pleas
Allen County Justice Center
P.O. Box 1243
Lima, Ohio
45802

(VOLUME 7 OF 10)

689 50

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

TABLE OF CONTENTS

(VOLUME 7 OF 10)

WEDNESDAY, SEPTEMBER, 16, 2015 -

COURT COMMENCED AT 8:40 A.M.	1199
CONTINUED DISCUSSION ON MOTION FOR MISTRIAL AND/OR MOTION FOR CONTINUANCE	1201
COURT RULING ON MOTION FOR MISTRIAL AND/OR MOTION FOR CONTINUANCE	1235
STATE'S TWENTY-FIFTH WITNESS CONTINUED - KEVIN KRAMER - RION	1248
- KOHLRIESER	1262
- RION	1271
STATE'S TWENTY-SIXTH WITNESS - SGT. CHARLES GODFREY - KOHLRIESER	1272
DISCUSSION REGARDING VIEWING OF STATE'S EXHIBIT '140'	1299
COURT RULING REGARDING STATE'S EXHIBIT '140'	1301
DISCUSSION REGARDING MOTION TO EXCLUDE KEVIN KRAMER'S TESTIMONY REGARDING A MAC-10 WEAPON	1301
COURT RULING - MOTION TO EXCLUDE TESTIMONY OVERRULED	1303
STATE'S TWENTY-SIXTH WITNESS CONTINUED - SGT. CHARLES GODFREY - KOHLRIESER	1304
- RION	1322
- KOHLRIESER	1334
- RION	1337

STATE'S TWENTY-SEVENTH WITNESS -	
SGT. CAMERON SMITH - MILLER	1339
- RION	1348
- MILLER	1353
- RION	1353
JURY EXCUSED FOR DAY AT 3:35 P.M.	1356
COURT RECESSED FOR DAY AT 3:37 P.M.	1358
 <u>THURSDAY, SEPTEMBER 17, 2015 -</u>	
COURT COMMENCED AT 9:32 A.M.	1359
DISCUSSION REGARDING DEFENSE'S MOTION FOR MISTRIAL AND STATE'S MOTION TO PLAY VIDEO OF HOLDING CELL INCIDENT (EX. '173')	1359
COURT RULING - MOTION FOR MISTRIAL OVERRULED	1366
COURT RULING - MOTION TO PLAY HOLDING CELL INCIDENT (EX. '173') ALLOWED	1369
STATE'S TWENTY-EIGHTH WITNESS -	
STEPHEN UPHAM - MILLER	1375
- RION	1395
- MILLER	1406
DISCUSSION REGARDING STATE CALLING A POSSIBLE WITNESS	1412
COURT RULING - MATTER UNDER ADVISEMENT	1416
VOLUME SEVEN CONCLUDED	1417

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

NOTE: THE FOLLOWING IS A LIST OF EXHIBITS OFFERED BY THE PARTIES AND RULED UPON BY THE COURT FOR ADMISSION INTO EVIDENCE. SAID EXHIBITS HAVE BEEN FILED WITH THE ALLEN COUNTY CLERK OF COURT'S OFFICE FOR TRANSFER TO THE THIRD DISTRICT COURT OF APPEALS.

MOTION FOR MISTRIAL --

STATE OF OHIO'S EXHIBITS -

- 1-M - B.C.I. REPORT FROM TODD WHARTON DATED APRIL 20, 2009 AND CURRICULUM VITAE FOR TODD WHARTON;
- 2-M - B.C.I. REPORT FROM HEATHER A. WILLIAMS DATED FEBRUARY 26, 2014 AND CURRICULUM VITAE FOR HEATHER A. WILLIAMS;
- 3-M - EXHIBIT LIST - STATE OF OHIO -VS- MARKELUS CARTER, CASE NO. CR2014 0139;
- 4-M - LIMA POLICE DEPARTMENT POST INCIDENT INVESTIGATION REPORT;

DEFENDANT'S EXHIBITS -

- HH - GRC DATABASE SEARCH RESULTS BY CARTRIDGE - CANDIDATE LIST OF 131 TYPES OF FIREARMS;
- HH-1 - MAUFACTURER RESULTS FOR FIREARMS;

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

NOTE: THE FOLLOWING IS A LIST OF EXHIBITS OFFERED BY THE PARTIES AND RULED UPON BY THE COURT FOR ADMISSION INTO EVIDENCE. SAID EXHIBITS HAVE BEEN FILED WITH THE ALLEN COUNTY CLERK OF COURT'S OFFICE FOR TRANSFER TO THE THIRD DISTRICT COURT OF APPEALS. HOWEVER, ANY EXHIBIT NOTED WITH AN ASTERISK (*) WAS NOT FILED WITH THE TRANSCRIPT AND SAID EXHIBITS ARE HELD AT THE ALLEN COUNTY COMMON PLEAS COURT AND ARE AVAILABLE UPON REQUEST.

STATE OF OHIO'S EXHIBITS -

- 1 - PHOTOGRAPH OF VICTIM, KENNETH WARRINGTON;
- 2 - E-MAIL FROM PAM CALLAHAN DATED 1-12-09;
- 3 - PHOTOGRAPH OF HOUSE AT 436 MCKIBBEN STREET;
- 4 - PHOTOGRAPH OF HOUSE AT 436 MCKIBBEN STREET;
- 5 - PHOTOGRAPH OF REAR OF HOUSE AT 436 MCKIBBEN STREET AND CAR AND PICK-UP TRUCK;
- 6 - PHOTOGRAPH OF VICTIM'S PICK-UP TRUCK;
- 7 - PHOTOGRAPH OF AEP BILL;
- 8-A - ALL CALLS FROM DECEMBER, 2007 STAND-OFF, INCLUDING DISCONNECTS AND HANG-UPS;
- 8-B - PHONE CONVERSATIONS OF CALLS FROM DECEMBER, 2007 STAND-OFF;
- 9 - 9-1-1 CALL;
- 10 - L.P.D. CRIME SCENE LOG;
- 11 - PHOTOGRAPH OF HOUSE AT 436 MCKIBBEN STREET WITH VICTIM LYING ON CONCRETE PAD;
- 12 - PHOTOGRAPH OF ALLEY NEXT TO HOUSE AT 436 MCKIBBEN STREET;

- 13 - PHOTOGRAPH OF VICTIM AT 436 MCKIBBEN STREET;
- 14 - PHOTOGRAPH OF VICTIM AT 436 MCKIBBEN STREET;
- 15 - PHOTOGRAPH OF VICTIM AT 436 MCKIBBEN STREET;
- 16 - PHOTOGRAPH OF CAR PARKED NEXT TO HOUSE AT
436 MCKIBBEN STREET;
- 17 - PHOTOGRAPH OF VICTIM'S TRUCK (DRIVER'S SIDE) PARKED
BEHIND HOUSE AT 436 MCKIBBEN STREET;
- 18 - PHOTOGRAPH OF VICTIM'S TRUCK (REAR) PARKED BEHIND
HOUSE AT 436 MCKIBBEN STREET;
- 19 - PHOTOGRAPH OF VICTIM'S TRUCK (PASSENGER SIDE) PARKED
BEHIND HOUSE AT 436 MCKIBBEN STREET;
- 20 - PHOTOGRAPH OF VICTIM ON CONCRETE PAD AT 436
MCKIBBEN STREET WITH MEASUREMENTS;
- 21 - PHOTOGRAPH OF SHOE IMPRINT WITH BLOOD AND
POSSIBLE ASH/TOBACCO;
- 22 - PHOTOGRAPH OF SHOE IMPRINT WITH BLOOD AND
POSSIBLE ASH/TOBACCO;
- 23 - PHOTOGRAPH OF BULLET HOLE IN VICTIM'S JACKET;
- 24 - PHOTOGRAPH OF BULLET HOLES IN VICTIM'S PANTS;
- 25 - PHOTOGRAPH OF TENT ONE WITH SHELL CASINGS;
- 26 - PHOTOGRAPH - CLOSE-UP OF TENT ONE WITH SHELL CASINGS;
- 27 - PHOTOGRAPH OF SHELL CASINGS WITH MEASUREMENTS;
- 28 - PHOTOGRAPH OF SPENT BULLET BY IGLOO COOLER;
- 29 - PHOTOGRAPH - CLOSE-UP OF TENT TWO DEPICTING SPENT
BULLET BY IGLOO COOLER;
- 30 - PHOTOGRAPH OF SPENT BULLET BEHIND VICTIM'S BODY;

- 31 - PHOTOGRAPH OF TENT THREE DEPICTING SPENT BULLET BEHIND VICTIM'S BODY;
- 32 - PHOTOGRAPH - CLOSE-UP OF TENT THREE DEPICTING SPENT BULLET BEHIND VICTIM'S BODY;
- 33 - PHOTOGRAPH OF DOOR WITH DOWEL ROD AT 436 MCKIBBEN STREET;
- 34 - PHOTOGRAPH OF DOOR WITH KEYS AT 436 MCKIBBEN STREET;
- 35 - PHOTOGRAPH OF BLOOD WITH MEASUREMENTS ON LOWER DOOR AT 436 MCKIBBEN STREET;
- 36 - PHOTOGRAPH - CLOSE-UP OF BLOOD AND DAMAGE ON LOWER DOOR AT 436 MCKIBBEN STREET;
- 37 - PHOTOGRAPH OF BLOOD AND DAMAGE TO MIDDLE OF DOOR AT 436 MCKIBBEN STREET;
- 38 - PHOTOGRAPH OF BLOOD AND DAMAGE TO MIDDLE OF DOOR WITH MEASUREMENTS AT 436 MCKIBBEN STREET;
- 39 - PHOTOGRAPH OF DAMAGE TO MIDDLE OF DOOR (CLOSE-UP) WITH MEASUREMENTS AT 436 MCKIBBEN STREET;
- 40 - PHOTOGRAPH OF DAMAGE CLOSE TO DOOR KNOB WITH MEASUREMENTS ON DOOR AT 436 MCKIBBEN STREET;
- 41 - PHOTOGRAPH OF DOOR FRAME AT 436 MCKIBBEN STREET;
- 42 - PHOTOGRAPH OF DOOR FRAME (CLOSE-UP) WITH MEASUREMENTS AT 436 MCKIBBEN STREET;
- 43 - PHOTOGRAPH OF DAMAGE TO UPPER DOOR WITH DOWEL ROD AT 436 MCKIBBEN STREET;
- 44 - PHOTOGRAPH OF DAMAGE TO UPPER DOOR (MID-RANGE) AT 436 MCKIBBEN STREET;
- 45 - PHOTOGRAPH OF DAMAGE TO UPPER DOOR, WITH MEASUREMENTS, AT 436 MCKIBBEN STREET;
- 46 - PHOTOGRAPH OF INSIDE OF DOOR FROM KITCHEN AT 436 MCKIBBEN STREET;

- 47 - PHOTOGRAPH OF DAMAGE TO UPPER DOOR FROM INSIDE AT 436 MCKIBBEN STREET;
- 48 - PHOTOGRAPH OF HOLE IN FREEZER AT 436 MCKIBBEN STREET;
- 49 - PHOTOGRAPH OF HOLE AND SPENT BULLET IN FREEZER AT 436 MCKIBBEN STREET;
- 50 - PHOTOGRAPH OF SPENT BULLET IN FREEZER (CLOSE-UP) AT 436 MCKIBBEN STREET;
- 51 - PHOTOGRAPH OF TENT FOUR DEPICTING SPENT BULLET IN FREEZER AT 436 MCKIBBEN STREET;
- 52 - PHOTOGRAPH OF KITCHEN AT 436 MCKIBBEN STREET;
- 53 - PHOTOGRAPH OF KITCHEN AT 436 MCKIBBEN STREET;
- 54 - PHOTOGRAPH OF AEP BIL ON COUNTER AT 436 MCKIBBEN STREET;
- 55 - PHOTOGRAPH OF NORTH FACING DOOR AND KITCHEN AND LIVING ROOM AT 436 MCKIBBEN STREET;
- 56 - PHOTOGRAPH OF LIVING ROOM AT 436 MCKIBBEN STREET;
- 57 - PHOTOGRAPH OF DOOR MAT AT 436 MCKIBBEN STREET;
- 58 - PHOTOGRAPH OF BULLET FRAGMENT AND BLOOD ON DOOR MAT AT 436 MCKIBBEN STREET;
- 59 - PHOTOGRAPH OF TENT FIVE DEPICTING BULLET FRAGMENTS ON DOOR MAT;
- 60 - PHOTOGRAPH OF MEASUREMENT OF BULLET FRAGMENT ABOVE 'O' ON DOOR MAT AT 436 MCKIBBEN STREET;
- 61 - PHOTOGRAPH OF TENT SIX DEPICTING BULLET FRAGMENT ABOVE 'O' ON DOOR MAT AT 436 MCKIBBEN STREET;
- 62 - PHOTOGRAPH SHOWING DIVOT IN CEMENT PAD WITH DOOR MAT REMOVED AT 436 MCKIBBEN STREET;

- 63 - PHOTOGRAPH OF TENT SEVEN DEPICTING DOOR MAT REMOVED AND DIVOT IN CEMENT PAD AT 436 MCKIBBEN STREET;
- 64 - PHOTOGRAPH OF DOOR THRESHOLD AT 436 MCKIBBEN STREET SHOWING GLASS, BLOOD, AND IGLOO COOLER;
- 65 - PHOTOGRAPH OF BULLET FRAGMENT, GLASS, AND BLOOD BY DOOR THRESHOLD AT 436 MCKIBBEN STREET;
- 66 - PHOTOGRAPH OF TENT EIGHT DEPICTING BULLET FRAGMENT, GLASS, AND BLOOD BY DOOR THRESHOLD AT 436 MCKIBBEN STREET;
- 67 - PHOTOGRAPH OF TENT EIGHT DEPICTING BULLET FRAGMENT, GLASS, AND BLOOD BY DOOR THRESHOLD AT 436 MCKIBBEN STREET;
- *68 - WINCHESTER 9 MM SHELL CASING FOUND AT 436 MCKIBBEN STREET;
- *69 - WINCHESTER 9 MM SHELL CASING FOUND AT 436 MCKIBBEN STREET;
- *70-A - SPENT BULLET BY VICTIM'S BODY FOUND AT 436 MCKIBBEN STREET;
- *70-B - SPENT BULLET BY IGLOO COOLER FOUND AT 436 MCKIBBEN STREET;
- *71 - SPENT BULLET FOUND IN FREEZER AT 436 MCKIBBEN STREET;
- *72 - FRAGMENT FOUND AT 436 MCKIBBEN STREET;
- *73 - FRAGMENT FOUND AT 436 MCKIBBEN STREET;
- *74 - FRAGMENT FOUND AT 436 MCKIBBEN STREET;
- *75 - FRAGMENT FOUND AT 436 MCKIBBEN STREET;
- *76 - FRAGMENT FOUND AT 436 MCKIBBEN STREET;
- 77 - AEP BILL FOUND AT 436 MCKIBBEN STREET;
- 78 - CURRICULUM VITAE FOR MANEESHA PANDEY, M.D.;

- 79 - AUTOPSY REPORT FOR KENNETH WARRINGTON;
- 80 - PHOTOGRAPH OF VICTIM'S UPPER BODY AS PRESENTED FOR AUTOPSY;
- 81 - PHOTOGRAPH OF VICTIM'S LOWER BODY AS PRESENTED AT AUTOPSY;
- 82 - PHOTOGRAPH OF VICTIM'S UPPER BODY UNCLOTHED AT AUTOPSY;
- 83 - PHOTOGRAPH OF VICTIM'S LOWER BODY UNCLOTHED AT AUTOPSY;
- 84 - PHOTOGRAPH OF INJURIES TO VICTIM'S LEGS;
- 85 - PHOTOGRAPH OF INJURIES TO VICTIM'S UPPER BODY;
- 86 - PHOTOGRAPH WITH ROD IN VICTIM'S NECK;
- 87 - PHOTOGRAPH OF INJURIES TO VICTIM'S LEFT CHEST;
- 88 - PHOTOGRAPH OF LABELS A AND B FROM AUTOPSY (ENTRANCE WOUNDS ON VICTIM'S BACK);
- 89 - PHOTOGRAPH OF EXIT WOUNDS ON VICTIM'S ABDOMEN;
- 90 - PHOTOGRAPH OF LABELS E AND F FROM AUTOPSY (EXIT WOUNDS ON ABDOMEN);
- 91 - PHOTOGRAPH OF LABELS C AND D FROM AUTOPSY (ENTRANCE AND EXIT WOUNDS ON RIGHT BUTTOCK);
- 92 - PHOTOGRAPH OF INJURIES TO VICTIM'S RIGHT FOREARM (ENTRANCE AND EXIT WOUNDS);
- 93 - PHOTOGRAPH OF LABELS K AND L FROM AUTOPSY (ENTRANCE AND EXIT WOUNDS TO RIGHT FOREARM);
- 94 - PHOTOGRAPH OF X-RAY OF VICTIM'S RIGHT FOREARM;
- 95 - SUMMARY OF GUNSHOT WOUNDS FROM AUTOPSY;
- 96 - DEATH CERTIFICATE FOR KENNETH WARRINGTON;

- 97 - DVD - CRUISER CAMERA VIDEO FROM PTL. MONTGOMERY'S CRUISER;
- 98 - DVD - DEFENDANT'S FIRST INTERVIEW ON 2-23-09;
- 99 - JUDGMENT ENTRY ON SENTENCING - STATE OF OHIO -VS- MARKELUS Q. CARTER, CASE NO. CR95 06 0268;
- 100 - JUDGMENT ENTRY (NUNC PRO TUNC) - STATE OF OHIO -VS- MARKELUS Q. CARTER, CASE NO. CR95 06 0268;
- 101 - PHOTOGRAPH OF CAMOUFLAGE CLOTHING FROM BEDROOM AT 122 EUREKA STREET;
- 102 - PHOTOGRAPH OF FRONT OF HOUSE AT 122 EUREKA STREET;
- 103 - PHOTOGRAPH OF PORCH AND HOUSE AT 122 EUREKA STREET;
- 104 - PHOTOGRAPH OF LIVING ROOM AT 122 EUREKA STREET;
- 105 - PHOTOGRAPH OF LIVING ROOM WITH LAPTOP AT 122 EUREKA STREET;
- 106 - PHOTOGRAPH OF BOX OF WINCHESTER AMMUNITION FOUND AT 122 EUREKA STREET;
- 107 - PHOTOGRAPH OF BOOK CASE AT 122 EUREKA STREET;
- 108 - PHOTOGRAPH OF ROOM AT 122 EUREKA STREET SHOWING MULTIPLE ELECTRONIC ITEMS;
- 109 - PHOTOGRAPH OF KITCHEN TABLE WITH GLOVES AND PAPERWORK AT 122 EUREKA STREET;
- 110 - PHOTOGRAPH OF VARIOUS E-MAILS FOUND AT 122 EUREKA STREET;
- 111 - PHOTOGRAPH OF VARIOUS E-MAILS FOUND AT 122 EUREKA STREET;
- 112 - PHOTOGRAPH OF VARIOUS E-MAILS FOUND AT 122 EUREKA STREET;

113 - PHOTOGRAPH OF VARIOUS E-MAILS FOUND AT 122 EUREKA STREET;

114 - PHOTOGRAPH OF VARIOUS E-MAILS FOUND AT 122 EUREKA STREET;

115-A - PHOTOGRAPH OF STUDIO ROOM AT 122 EUREKA STREET;

115-B - PHOTOGRAPH OF FIREARM IN STUDIO ROOM AT 122 EUREKA STREET;

116 - PHOTOGRAPH OF STUDIO ROOM AT 122 EUREKA STREET;

117-A - PHOTOGRAPH OF CAMOUFLAGE CLOTHING AT 122 EUREKA STREET;

117-B - PHOTOGRAPH OF CLOSET IN BEDROOM AT 122 EUREKA STREET;

117-C - PHOTOGRAPH OF WOODEN CHEST FOUND IN CLOSET AT 122 EUREKA STREET;

118 - PHOTOGRAPH OF FIREARM IN WOODEN BOX FOUND AT 122 EUREKA STREET;

119 - PHOTOGRAPH OF 9 MM SEMI-AUTOMATIC PISTOL FOUND AT 122 EUREKA STREET;

120 - PHOTOGRAPH OF BEDROOM AT 122 EUREKA STREET;

121 - PHOTOGRAPH OF BEDROOM AT 122 EUREKA STREET;

122 - PHOTOGRAPH OF BEDROOM AT 122 EUREKA STREET;

123 - PHOTOGRAPH OF LAUNDRY ROOM AT 122 EUREKA STREET;

124 - PHOTOGRAPH OF SECOND FLOOR HALLWAY AT 122 EUREKA STREET;

125 - PHOTOGRAPH OF BEDROOM AT 122 EUREKA STREET;

126 - PHOTOGRAPH OF BEDROOM AT 122 EUREKA STREET;

127 - PHOTOGRAPH OF BASEMENT STEPS AT 122 EUREKA STREET;

128-A - PHOTOGRAPH OF BASEMENT AT 122 EUREKA STREET;

128-B - PHOTOGRAPH OF RIFEL IN BASEMENT AT 122 EUREKA STREET;

128-C - PHOTOGRAPH OF CAMOUFLAGE CLOTHING IN BASEMENT AT 122 EUREKA STREET;

*129 - BOX OF WINCHESTER 9 MM AMMUNITION;

*130 - LONG-SLEEVED CAMOUFLAGE SHIRT FOUND AT 122 EUREKA STREET;

*131 - SHORT-SLEEVED CAMOUFLAGE SHIRT FOUND AT 122 EUREKA STREET;

*132 - BLACK GLOVES FOUND ON KITCHEN TABLE AT 122 EUREKA STREET;

133 - WRITTEN SCRIPT FOUND AT 122 EUREKA STREET;

134 - VARIOUS E-MAILS FOUND ON KITCHEN TABLE AT 122 EUREKA STREET;

135 - VARIOUS COURT DOCUMENTS AND MISCELLANEOUS PAPERWORK FOUND ON KITCHEN TABLE AT 122 EUREKA STREET;

136 - B.C.I. REPORT FROM MATTHEW CONGLETON REGARDING G.S.R. FROM SUBMITTED CLOTHING AND CURRICULUM VITAE FOR MATTHEW CONGLETON;

137 - B.C.I. REPORT FROM MATTHEW CONGLETON REGARDING G.S.R. FROM DEFENDANT'S CAR;

138 - B.C.I. REPORT FROM KEVIN KRAMER REGARDING BALLISTICS AND CURRICULUM VITAE FOR KEVIN KRAMER;

139 - PHOTOGRAPH OF MAC-10 WEAPON;

140-A - DVD OF DEFENDANT'S SECOND INTERVIEW ON 2-23-09;

*141 - SONY DSCT9 DIGITAL CAMERA;

142 - PHOTOGRAPH TAKEN OFF OF DEFENDANT'S CAMERA
SHOWING UNDERPASS ON ELM STREET;

143 - PHOTOGRAPH TAKEN OFF OF DEFENDANT'S CAMERA;

144 - PHOTOGRAPH TAKEN OFF OF DEFENDANT'S CAMERA
SHOWING INTERSECTION OF JACKSON AND NORTH STREETS;

147 - FILE PHOTOGRAPH OF DEFENDANT WITH MASK;

148 - PHOTOGRAPH OF DEFENDANT WITH PAINTBALL MASK
AND GLOVES;

*150 - AERIAL PHOTOGRAPH OF 400 BLOCK OF EAST MCKIBBEN
STREET AND EAST PEARL STREET;

151 - GOOGLE MAP -- **(NOT ADMITTED BY COURT)**;

152 - GAS RECEIPT;

153 - PHOTOGRAPH OF FRONT OF DEFENDANT'S BLACK EXPLORER;

154 - PHOTOGRAPH OF REAR OF DEFENDANT'S BLACK EXPLORER;

155 - PHOTOGRAPH OF FRONT INTERIOR OF DEFENDANT'S BLACK
EXPLORER;

156 - PHOTOGRAPH OF GAS RECEIPT AND KEY;

157 - PHOTOGRAPH OF VICTIM'S BODY ON CONCRETE PAD AT
436 MCKIBBEN STREET;

158 - PHOTOGRAPH OF VICTIM'S BODY ON CONCRETE PAD AND
PARKED VEHICLE AT 436 MCKIBBEN STREET;

159 - PHOTOGRAPH OF CONTENTS OF IGLOO COOLER;

160 - PHOTOGRAPH OF TIN WITH CONTENTS;

161 - PHOTOGRAPH OF MONEY AND TWO DEBIT/CREDIT CARDS;

162 - PHOTOGRAPH OF MONEY, DRIVER'S LICENSE, AND I.D. TAG;

163 - CURRICULUM VITAE FOR KEVIN DELONG;

- 164 - PHOTOGRAPH OF DEFENDANT;
- 165 - ALLEN COUNTY AUDITOR'S WEBSITE SEARCH FOR
SONYA BURKHOLDER;
- 166 - PLOT MAP;
- 167 - HUSKY LIMA REFINERY SEARCH AND SEARCH FOR
KENNETH WARRINGTON;
- 168 - DEFENDANT'S MYSPACE PAGE;
- 169 - B.C.I. EVIDENCE RETURN SUBMISSION SHEET;
- 170 - B.C.I. EVIDENCE RETURN SUBMISSION SHEET;
- 172 - B.C.I. EVIDENCE SUBMISSION FORMS;
- 173 - DVD OF HOLDING ROOM INCIDENT;
- 174 - PHOTOGRAPH OF STEPHEN UPHAM;
- 175 - PHOTOGRAPH OF STEPHEN UPHAM - INJURY TO ARM;
- 176 - PHOTOGRAPH OF STEPHEN UPHAM - INJURY TO ARM;
- 177 - PHOTOGRAPH OF STEPHEN UPHAM - INJURY TO LEFT EYE;
- 178 - PHOTOGRAPH OF STEPHEN UPHAM - INJURY TO LEFT EYE;
- 179 - PHOTOGRAPH OF STEPHEN UPHAM - INJURY TO LEFT EYE;
- 180 - PHOTOGRAPH OF STEPHEN UPHAM - SCRATCH TO BACK OF
HEAD/NECK;

DEFENDANT'S EXHIBITS -

- A - 2007 E-MAILS BETWEEN SONYA HUGHES AND KENNETH
WARRINGTON;
- B - PHOTOGRAPH OF LICENSE PLATE - #1 ASSHOLE;
- C - PHOTOGRAPH OF SHED AND DEFENDANT'S TRUCK AT 436
MCKIBBEN STREET;

- D - PHOTOGRAPH OF REAR OF HOUSE AT 436 MCKIBBEN STREET AND REAR OF VICTIM'S TRUCK;
- E - PHOTOGRAPH OF REAR OF HOUSE AT 436 MCKIBBEN STREET, SHED, AND SIDE/REAR OF VICTIM'S TRUCK;
- F - PHOTOGRAPH OF SIDE/REAR OF HOUSE AT 436 MCKIBBEN STREET, SHED, CAR, AND SIDE/REAR OF VICTIM'S TRUCK;
- G - PHOTOGRAPH OF SHOE IMPRINT WITH BLOOD AND POSSIBLE ASH/TOBACCO;
- H - PHOTOGRAPH OF SHOE IMPRINT WITH BLOOD AND POSSIBLE ASH/TOBACCO;
- I - PHOTOGRAPH OF CONCRETE PAD AND SHOE IMPRINT WITH BLOOD AND POSSIBLE ASH/TOBACCO;
- J - PHOTOGRAPH OF CONCRETE PAD AND SHOE IMPRINT WITH BLOOD AND POSSIBLE ASH/TOBACCO;
- K - PHOTOGRAPH OF CONCRETE PAD WITH BLOOD;
- L - PHOTOGRAPH OF CONCRETE PAD WITH BLOOD AND SHOE IMPRINT WITH BLOOD AND POSSIBLE ASH/TOBACCO;
- M - LIMA POLICE DEPARTMENT PROPERTY LOG;
- N - DRAWING OF HOUSE AND SHED AT 436 MCKIBBEN STREET;
- O - PHOTOGRAPH OF OPENED GUN CASE AT 122 EUREKA STREET;
- P - PHOTOGRAPH OF MOVIE/BOOK CASE AT 122 EUREKA STREET;
- Q - PHOTOGRAPH OF BOX OF WINCHESTER AMMUNITION ON MOVIE/BOOK CASE AT 122 EUREKA STREET;
- R - PHOTOGRAPH OF BEDROOM AT 122 EUREKA STREET;
- S - PHOTOGRAPH OF BEDROOM WITH CAMOUFLAGE CLOTHING AT 122 EUREKA STREET;
- T - PHOTOGRAPH OF BEDROOM WITH WITH CAMOUFLAGE CLOTHING AT 122 EUREKA STREET;

U - PHOTOGRAPH OF WOODEN BOX IN CLOSET IN BEDROOM AT 122 EUREKA STREET;

V - PHOTOGRAPH OF .357 FIREARM;

W - PHOTOGRAPH OF CAMOUFLAGE PANTS - **(NOT ADMITTED BY COURT)**;

X - PHOTOGRAPH OF BASEMENT AT 122 EUREKA STREET;

Y - PHOTOGRAPH OF BASEMENT WITH CAMOUFLAGE CLOTHING AT 122 EUREKA STREET;

Z - LIMA POLICE DEPARTMENT PROPERTY LOGS;

AA - INDICTMENT AND JUDGMENT ENTRY OF SENTENCING IN STATE OF OHIO -VS- JOSEPH A. MOORE, CASE NO. CR2012 0367;

BB - JUDGMENT ENTRY FINDING VIOLATION OF COMMUNITY CONTROLS IN STATE OF OHIO -VS- JOSEPH A. MOORE, CASE NO. CR2012 0367;

CC - INDICTMENT IN CR2009 0069, STATE OF OHIO -VS- JOSEPH A. MOORE;

DD - JUDGMENT ENTRY ON SENTENCING IN STATE OF OHIO -VS- JOSEPH A. MOORE, CASE NO. CR2009 0060;

EE - B.C.I. REPORT FROM DANIEL DAVISON REGARDING G.S.R. FROM DEFENDANT'S HANDS/FACE;

FF - B.C.I. REPORT FROM TODD WHARTON **(WITHDRAWN BY THE DEFENSE)**;

II - JUDGMENT ENTRY ON SENTENCING FOR STATE OF OHIO -VS- STEPHEN UPHAM, LUCAS CO. CASE NO. G-4801-CR-0201101176-000;

JJ - LETTER TO LIMA POLICE DEPARTMENT;

KK - COPY OF ALLSTATE INSURANCE CARDS/PROOFS;

LL - B.C.I. REPORT FROM VICKIE BARTHOLOMEW REGARDING
FINGERPRINT COMPARISONS AND CURRICULUM VITAE FOR
VICKIE BARTHOLOMEW;

COURT'S EXHIBITS -

- 1 - A.C.S.O. OFFENSE REPORTS REGARDING DEFENDANT AND
STEPHEN UPHAM;
- 2 - DVD OF HOLDING ROOM CELL INCIDENT (SECOND VIEW)
BETWEEN DEFENDANT AND STEPHEN UPHAM;
- 3 - NOTE FROM JURY TO THE COURT;
- 4 - COURT'S ORDER TO SUPPLEMENT RECORD WITH ATTACHED
A.C.S.O. OFFENSE REPORTS;

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

1 **WEDNESDAY, SEPTEMBER 16, 2015**

2 **8:40 A.M.**

3
4 THE COURT: Okay. The record should
5 reflect that today is the 16th day of September, 2015. We are reconvening in
6 Case Number CR2014 0139, State of Ohio -vs- Markelus Q. Carter. The
7 defendant is present in Court with his attorney. The State is present. The
8 jurors are not in the Courtroom. They weren't due here just yet. We are a
9 little bit behind where I thought we would be because I had some other
10 matters. But, nonetheless, we'll give full consideration to the issue that's
11 before the Court here.

12 I just realized -- oh, never mind. I thought I left something in my
13 chambers. The record will show what was discussed yesterday on the 15th
14 right at the end of the day after the direct examination of the State's witness,
15 Kevin Kramer. There was an oral motion and we had a bit of a discussion
16 and the Court left it with taking the matter under advisement, allowing the
17 parties to prepare to discuss it a little further this morning.

18 I will note for the record that it had been brought to my attention that
19 Mr. Rion has filed a written Motion, or at least there is a written Motion for
20 Mistrial. I know we checked with the Clerk's Office. I don't know if the Clerk's
21 Office has gotten it. We gave the Clerk's Office a copy that we got over the
22 fax and I think they're going to go ahead and file-stamp that. But, just for the
23 record we'll note that there is a written Motion for Mistrial. I just received it

1 and I haven't read it through. I would like to take a few minutes. We got the
2 State a copy, too. So, let's just take a quick few minutes. We can go off the
3 record. I'm going to review the memorandum that's attached to the Motion
4 and then we'll come back on the record. Okay?

5 (WHEREUPON, Court went off the record briefly.)

6 THE COURT: All right. We're back on the
7 record. The Court has reviewed the written Motion for Mistrial and the
8 memorandum supporting that. I will note for the record, too, because
9 obviously we were all aware that there would be some issues, the Court has
10 also done some independent research.

11 Did the State have a chance to review the defense's written Motion --

12 MRS. KOHLRIESER: Yes, your Honor.

13 THE COURT: -- sufficient enough that
14 you'll be prepared to respond now? I know we had some discussions
15 yesterday. I know there's a written Motion. It is part of the record now. I'll
16 give each side an opportunity to reiterate or add to -- I don't want the whole
17 argument again. We don't need you to read your memorandum, Mr. Rion. I
18 mean, I know -- I think I've got the basis of it. I'm going to give you an
19 opportunity because I think the Court is required to have an inquiry here. So,
20 I may have some questions. So, go ahead. It is the defense's motion. If
21 there's anything additional you want to say that's not already been said
22 yesterday, or that you haven't put in your written Motion, if you just want to
23 maybe hit your highlights or add to anything that you haven't already put in

1 writing or on the record.

2 MR. RION: Your Honor, I think at this point
3 I would need to call the prosecutor to the stand on the issue of -- well, this
4 Proby case that came out just two weeks ago seems to lay out the standard
5 fairly clearly. There's a three prong test that deals with part of Rule 16
6 violations. The Court does not have, I don't think, the report that was utilized
7 by the expert witness for his testimony as it relates to the Mac-10 that was
8 provided to us after direct examination yesterday. I think that should be part
9 of the record because the Court needs to see how long they've had this and
10 what the document actually shows. But, I think it's relevant for the Court to
11 know how long the prosecutors have known of this document and the
12 information contained therein and/or obviously she's subject to the knowledge
13 of her witnesses.

14 THE COURT: Yea, I'd like to see that. I'd
15 also -- I know yesterday I was shown, obviously, Mr. Kramer's report that was
16 made an exhibit. I think there was a defense exhibit --

17 MRS. KOHLRIESER: I have three State's
18 exhibits, your Honor.

19 THE COURT: -- of Mr. Wharton's report. I
20 don't know if we ever -- there was a Williams. I don't know if I ever saw a
21 Williams report. Do you have that?

22 MRS. KOHLRIESER: I have all three
23 reports. I was planning to --

1 THE COURT: And then is there something
2 additional because we talked about this list of possible candidate firearms. Is
3 that what you're referring to?

4 MR. RION: Well, I think, or what I've been
5 able to determine what happened is that at least as early as February 26th of
6 2014 --

7 THE COURT: That's what you've got in
8 your Motion; yea.

9 MR. RION: -- B.C.I. conducted an analysis
10 and reached some conclusions. Essentially what they did is they entered into
11 a data base certain findings, or, certain measurements and from those
12 measurements then compared those measurements against an F.B.I. list and
13 then drew conclusions as to weapons that would be consistent given those
14 measurements and given those findings to reach their conclusion which, after
15 analysis, they testified to. So, that's I think what this --

16 THE COURT: If we can, let's make that an
17 exhibit.

18 MR. RION: I'll need a copy because this is
19 the only one I have. This is Defendant's exhibit 'HH'.

20 THE COURT: It's got the punch hole
21 there. Is that the G.R.S. data base? Is that what he called it?

22 MRS. KOHLRIESER: G.R.C. or something
23 like that.

1 THE COURT: G.R.C.? The punch hole is
2 right over the letters. I remember Mr. Kramer saying something about a G.R.
3 something or other data base. Well, why don't we go ahead. Monica, can
4 you make a copy? Do you guys have -- does the State have a copy?

5 MRS. KOHLRIESER: Yes. We provided
6 that to Mr. Rion.

7 THE COURT: Make a copy.

8 BAILIFF: One?

9 THE COURT: Yea, just one.

10 MR. RION: I'll state that in addition last
11 night, given the raising of this issue, I was able to contact an expert who
12 currently is, though he's stationed close to here, he was in Virginia. I couldn't
13 figure out if he was there on a case or there on vacation. He indicated that
14 the measurements that were utilized to come up with the State's conclusion in
15 this, in his opinion, may be overly broad. In other words, you'll see in
16 Defense exhibit 'HH' that there is a range from point zero seven one or so to
17 point zero eight nine.

18 THE COURT: Okay. I'll keep the one
19 that's got the green evidence sticker. I'll give you the copy. Let me ask, in
20 terms of making an inquiry here, who was the expert?

21 MRS. KOHLRIESER: Todd Wharton.

22 THE COURT: No. The one you
23 contacted.

1 MRS. KOHLRIESER: Oh, his? Sorry.

2 MR. RION: The ballistics expert, his name
3 is David Townsend.

4 MR. MILLER: Your Honor, may --

5 THE COURT: Just a second. I'll give you
6 a chance. Mr. Rion is going first here. Was that listed -- was he listed as a
7 defense expert before? Did you have a firearms expert before?

8 MR. RION: We had a G.S.R. -- we had
9 contacted a G.S.R. expert, thinking that was going to be --

10 THE COURT: Okay. I saw that. There
11 was a file -- there was something filed in there about getting a gunshot
12 residue expert.

13 MR. RION: And then he was -- we actually
14 initially consulted with Mr. Townsend as related to G.S.R. and for various
15 reasons that I don't need to go into -- well, so we consulted with him as it
16 related to G.S.R. We did not realize that there was a ballistics issue as it
17 relates to a conclusion as to a weapon and so we didn't inquire with him as
18 far as the ballistics issue.

19 THE COURT: Let me ask you then again
20 as just a part of my consideration, did you inquire when you spoke to him last
21 night about his availability for the next couple of weeks?

22 MR. RION: He told me that 'here's what
23 would be needed'. You can see on State's exhibit, or, Defense exhibit 'HH'

1 that essentially there's some parameters. There's some minimum land widths
2 of point zero seven one and maximum of point zero eight three and then
3 minimum groove widths of point zero nine seven and maximum of point one
4 oh nine. In addition, which I'm not sure how it -- I don't know how these two
5 documents are connected since we both received them yesterday, but I'll also
6 give you 'HH-1'. 'HH-1' seems to be another thing, another document that
7 was utilized by the State's expert that deals with lands and grooves and
8 measurements, certain measurements, were assumed or calculated on the
9 top. You can see on Defendant's exhibit 'HH' that it gives the minimum and
10 maximum land width and groove width and then from that draws certain
11 conclusions. That's the information there that's in the data base. This expert,
12 who I think he's nationally renowned, is of the belief that those measurements
13 are overly broad. In other words, you can see on the top right the total hits,
14 the top right of the paper, of 'HH', it says 'total hits one thirty-one'. I think he's
15 saying that there's a hundred and thirty-one types of weapons that could be,
16 or, that fit under the parameters that were put into the paperwork. You can
17 also tell by looking at this front page that there's no -- you can also exclude
18 information by the shell casing itself. In other words, the firing pin and the
19 way the casing, or the cartridge, is ejected from the mechanism can also
20 include or exclude. It can narrow the list down if that was taken into
21 consideration. In this case it looks like the data that was utilized to come up
22 with, well, did not include the firing pin or the cartridge into consideration for
23 the minimization of the list. He said that he would have to look at the casings

1 and look at the bullets and do his own measurements to see if this list is
2 accurate. So, I think it's more a question of his availability of when he gets
3 back from Virginia, which he wasn't able to, or, I wasn't able to pin that down.
4 But, secondly, he would need to then utilize the data that they utilized to see if
5 the conclusion is accurate or not.

6 I think what is very clear from this and, your Honor, if we use DNA as
7 an example, DNA is sort of similar to this. You take certain measurements,
8 certain clinical findings, and then compare it against various data bases or
9 another base of information to then see if there is matches or not matches. I
10 think that there's really very little difference between an opinion about the
11 match of a DNA and this. It's just a different format.

12 In addition, it's my belief that he would testify that even given the
13 minimal information that he had that he would likely be able to determine
14 whether or not a Mac-10 would fit in this list or not if he were to look at it and I
15 think he was of the opinion from what we were able to provide to him, we
16 faxed him this list or e-mailed him this list yesterday, and thinking that he
17 would have contrary opinions. So, it's not just a futile oh look at it and confirm
18 it's the same. I think he would have serious concerns about whether or not
19 this list is, in fact, accurate. I would be happy to explain it if the Court finds
20 that relevant. But, he was of the opinion, and I was hoping to get a letter from
21 him this morning, I think it's generating as we speak, confirming that his
22 opinion would be that there's grave concern that this list should not include a
23 Mac-10.

1 So, that was what I was able to do within three or four hours last night
2 as far as consulting experts to look into it. Your Honor, I have to frankly say
3 that is a very complex issue. It's not simple. It is of magnitude. The Proby
4 case, which is out of Franklin County, which I didn't include there, but it lays
5 out the standard. Essentially in that case here's what happened. The
6 prosecutor put on a handwriting expert and after the expert testified it became
7 clear that his testimony was different than what his report was. Defense
8 counsel objected. But, in that case essentially there was a name that was,
9 that they were identifying for the handwriting sample, but in that sample the
10 expert actually changed his opinion to the benefit of the defendant and stated
11 that the first name he could not say was the handwriting of the person that
12 they were trying to compare it to, but the middle name is. So, in that case the
13 Court inquired from defense counsel -- and then they asked the prosecutor,
14 'when did you find this out'. The prosecutor said, "Well, I knew that he was
15 going to testify to that before he testified." "Did you disclose it?" "No." So,
16 then he turns to defense counsel and says, "Look, there's a clear Rule 16
17 violation. But, the third prong of the test is, 'are you prejudiced by this'." In
18 that case the defense counsel had to admit that there was no prejudice really.
19 It was minute. In this case had we known that this analysis had been done
20 and conclusions had been reached, maybe even back in February of 2014,
21 specifically as to a Mac-10, I'm prepared to proffer to this Court that we have
22 an expert that would be able to reach conclusions and so I believe those
23 conclusions would be of great bearing with what has been provided as of

1 yesterday to defense counsel.

2 It's also my belief that given the comments of the prosecutor yesterday
3 that the prosecutor knew that they were going into this area and they knew
4 that that information had not been disclosed. Comments made by the
5 prosecutor to the effect of 'we don't have to tell defense counsel our entire
6 case' would be indicative that this was a trial strategy. I'll add to that if the
7 Court notes that the picture of the Mac-10 was not provided in discovery. It
8 had never been shown to defense counsel prior to yesterday. Though there
9 may have been a reference in an exhibit list, well, frankly that was an exhibit
10 list and I assumed that it was going to deal with pictures that had already
11 been disclosed.

12 On top of that, I don't know if you know too much about a Mac-10, but
13 a Mac-10 is a fully automatic sub-machine gun. It was created in the sixties.

14 MRS. KOHLRIESER: No, it's not.

15 MR. RION: Yes, it is.

16 MRS. KOHLRIESER: No, it's not.

17 MR. MILLER: No, it's not.

18 MR. RION: Well, a Mac-10 is a fully
19 automatic sub-machine gun. It was created in response to duplicate, I think,
20 an Uzi that was developed in Israel in the sixties. A Mac-10 has very different
21 classifications and qualities than a semi-automatic nine millimeter pistol. So,
22 the prosecutor said, "Well, you're on notice on this issue about a Mac-10."
23 When I heard Mac-10 I was thinking machine gun. So, the testimony of Joey

1 Moore, or the statement of Joey Moore that there's a Mac-10, I can proffer to
2 this Court that every statement by the detective in the discovery, every single
3 one by this detective would indicate that they were looking for a silver and
4 black nine millimeter semi-automatic. That's everyone that he asked for it.
5 On top of that, all the witnesses that we talked to are talking what they heard,
6 and the shots, and the pattern. It was a semi-automatic. It wasn't a
7 machine gun. So, the idea that somehow I could anticipate that an expert
8 would be talking about a machine gun in trial is just beyond -- well, it would
9 take a lot of creative imagination to get to that point and I was just not on
10 notice of it.

11 I also submit, either under oath or if you take my proffer, that Defense
12 exhibit 'HH' was never provided. If you read the expert reports in total the gist
13 of the report is that the weapons found in Mr. Carter's house were not those
14 that were utilized at the scene. That's how the report reads if you read the
15 paragraphs in connection with each other.

16 This is a very -- this is turning out to be a very important factor, your
17 Honor. I am prejudiced. I am telling the Court though I worked until
18 eleven-thirty and woke up at three o'clock this morning, three forty-eight, to
19 continue to work to get prepared for today I am not in a position to cross
20 examine an expert witness about a Mac-10, the qualities of a Mac-10, or the
21 variations of a Mac-10 over time. So, it will be an ineffective cross regardless
22 of how shoestrunged together I can put it. There's no other way to say it.

23 The only reason I would think that a prosecutor would have to testify

1 as it relates to the three prong test of when they were aware of this
2 information, when they were going to ask whether or not it was disclosed to
3 counsel, and I think maybe they can tell the Court. But, those are the factors
4 that are very important for the Court's determination I think in this.

5 THE COURT: You had mentioned putting
6 a prosecutor on the stand. You basically wanted to have these exhibits
7 identified and when they were disclosed? Or, was there more information
8 that you wanted to get?

9 MR. RION: Let me pull up the three prong
10 test for you.

11 THE COURT: I've got it. Number one -
12 whether the failure to disclose was a willful violation; whether foreknowledge
13 of the undisclosed material would have benefited the accused; whether the
14 accused was prejudiced. Is that the same one you're talking about?

15 MR. RION: Yes.

16 THE COURT: That was originally, I think
17 in State -vs- Parson, 6 Ohio State 3d, 442. I believe that's the same test that
18 they referred to in the Proby case. Is that how you pronounce that?

19 MR. RION: Yes, your Honor, I believe.

20 THE COURT: I've read that case and I've
21 read some of these others. I'm aware of that test. I just want to -- I'm not
22 trying to limit you if there's something else you wanted to get out of the
23 prosecutor. I don't know if we need to put them on the stand, or maybe

1 they can make representations if you would indicate what you are trying to get
2 out of them. We're all officers of the Court. They can make representations, I
3 think would be the same.

4 MR. RION: Well, that would be --

5 THE COURT: You just got 'HH' and 'HH-1'
6 yesterday; correct?

7 MR. RION: Yes.

8 THE COURT: Is that correct from the
9 State?

10 MRS. KOHLRIESER: Your Honor, the
11 State would stipulate that 'HH' and 'HH-1' were provided yesterday after the
12 jury was sent home, in accordance with the Court's instructions. Mr. Kramer
13 had them on him when he came to testify. I asked Mr. Rion to hang on for
14 two minutes and I copied them and gave them to him.

15 THE COURT: Okay. Now, is there
16 anything else you want from the prosecutor that maybe they'll stipulate to? If
17 not, we can put them on the stand.

18 MRS. KOHLRIESER: We would also
19 stipulate that prior to yesterday we had not given these documents to Mr.
20 Rion.

21 THE COURT: Anything else that you
22 want? I mean, you wanted to put her on the stand. I'm just trying to see what
23 you were --

1 MR. RION: Well, sure. Sure. I mean, we
2 can be informal, but I need to know when they had these documents or were
3 made aware of this expert's testimony. That's important, I think.

4 THE COURT: Fair enough. Can you
5 answer that?

6 MRS. KOHLRIESER: Yea. Oh,
7 absolutely, your Honor. We were made aware of these documents, -- well, I
8 don't recall the exact date. I know I was on vacation the week of August 16th.
9 It was the week after that sometime that we went and met with Mr. Kramer up
10 at B.C.I. and spoke to him. It was at that time, and I can't remember how the
11 discussion came up, but it was at that time where he said, "Oh, well, the list of
12 candidates," and we inquired, "what are you talking about," and he, again, in
13 his notes, had these. I will also say that I didn't ask him for a copy of them at
14 that point. He just said that, "Yes, there are Mac-10's on there." I believe two
15 different ones he talked about at that time. That's when we first became
16 aware of it.

17 I guess for purposes of the first prong, should a Court be looking at this
18 down the road some day, the State believed -- they weren't provided by B.C.I.
19 as part of its report. We understood that these were part of B.C.I.'s notes that
20 they keep. They reported out, and I don't want to get into that at this point.
21 We can certainly -- I have exhibits and things of that nature. But, at any point
22 both myself and Mr. Miller, we discussed this, albeit in a very small fashion,
23 but never thought for a second that this was anything other than their lab

1 notes, which Criminal Rule 16 does not require us to give those notes. We
2 thought it was a note that supported one of the findings contained later in the
3 report. I do have some exhibits for the Court. I don't know how you want to
4 handle this.

5 THE COURT: Okay. Well, I'll give you a
6 chance to respond. Anything else that you want to inquire of the prosecutor?

7 MR. RION: There was an exhibit that was
8 shown to the jury yesterday, a picture that's been purported to be a Mac-10. I
9 think it needs to be very clear that that picture itself had not been provided to
10 defense counsel prior to being shown to the jury. I think that needs to be
11 clear. I'm not talking about the exhibit list. I'm talking about the actual
12 picture.

13 MRS. KOHLRIESER: Your Honor? I
14 apologize. Again, that was something that Mr. Miller found on the Internet,
15 basically what the style of a Mac-10 looks like, particularly when Carlotta
16 Williams had indicated in our trial prep. that he had this gun and things of that
17 nature, and then we found out, in fact, there's a Mac-10 on the list of possible
18 guns. Quite frankly, through inadvertence, neither one of us gave that picture
19 to Mr. Rion prior to trial. However, I will say, and again I'm going to mark it as
20 an exhibit, I provided him, albeit on the first day of trial, 9-8, the first time this
21 picture was used was 9-14 or 9-15, 9-15, sorry, yesterday, the days are
22 blending together, and I can't help it he assumed what it was. It says 'photo
23 of Mac-10'. So, there was disclosure given that we were going to be

1 introducing that photo. Again, it wasn't that we were keeping it from him. If
2 any time he said, 'hey, let me see State's exhibit '152', I would have showed
3 him '152'. It wasn't some intentional thing done on our part in any way,
4 shape, or form. We just didn't realize that we had not shown him a copy of
5 that.

6 THE COURT: All right. Anything else you
7 want to inquire of the prosecutor's office?

8 MR. RION: For the record, when Carlotta
9 Williams was shown that document I'd like an acknowledgement that it had
10 not been, as with other exhibits where we've been fairly good, not perfect, but
11 fairly good with showing each other exhibits and I want an acknowledgement
12 that that Mac-10 picture was thrown on the screen in front of the jury before
13 counsel even was shown it before it was published.

14 MRS. KOHLRIESER: Your Honor, I can't
15 attest to that.

16 MR. MILLER: I'll attest to that because
17 Carlotta was my witness. You know, I frankly don't recall whether I showed it
18 to Mr. Rion before I showed it to Carlotta. The thing is, as Mr. Rion said, I
19 think everybody has tried in this trial to be, you know, while not perfect, has
20 tried to do that while handling exhibits, as in any other trial, but particularly
21 this one where we've got nearly two hundred exhibits or whatever and
22 sometimes that's not done. Now, that was not some nefarious thing. I will
23 note that when the picture was shown I don't recall Mr. Rion objecting to the

1 fact that he had not seen that particular photo. It was not until Mr. Kramer
2 took the stand and was talking about a Mac-10 that Mr. Rion objected to any
3 use of this picture whatsoever which, by the way, was some, and, you know, I
4 don't know exactly how much time, but there was, well, I don't know if Mr.
5 Kramer was the next witness after --

6 MRS. KOHLRIESER: Congleton was.

7 MR. MILLER: There was another witness
8 after Miss Williams. I believe it was Congleton and then Kramer. So, some
9 hour or two hours, I don't know, but at least another witness testified before
10 there was any objection whatsoever. It wasn't until, and I think this is
11 important, it wasn't until Mr. Kramer took the stand and began to talk about a
12 Mac-10 that, you know, there was any objection to the use of that picture
13 whatsoever. For the record, it was an hour or so or longer before that was
14 done.

15 MR. RION: Your Honor, once the picture
16 is shown -- I can explain the situation. The jury has the picture on the big
17 screen. They're looking at it. The damage is done at that point. I really don't
18 want to highlight it while we're up at side bar while they're sitting there and
19 looking at this picture of the Mac-10. Had it been presented to me before it
20 was published to the jury I would have objected to it because it hadn't been --
21 I mean, I think another Rule 16 specifically states that exhibits have to be
22 disclosed to counsel before trial. It seems rudimentary. Even the Federal
23 Law allows for that and the State of Ohio is far more.

20 THE COURT: All right. Now, the State, do
21 you want to have a formal response? I know we've gone back and forth a
22 little bit.

23 MRS. KOHLRIESER: Your Honor, I think

1 to fairly judge this case, this particular issue, I'm going to hand you a number
2 of exhibits. I've marked it '1-M'. I've dated it with today's date. I've labeled it
3 'mistrial' just so we'd know what kind of motion we're talking about. '2-M'.
4 Again, I've labeled it with today's date and 'mistrial' so we know what we're
5 talking about. I'm showing them to Mr. Rion as we're discussing this right
6 now. State's exhibit '3-M' and State's exhibit '4-M'. I'll explain to the Court
7 what each of these exhibits are.

8 State's exhibit '1-M' is, I believe, 'FF', marked by the defendant. That
9 is Todd Wharton's report. If you look at the second page of Mr. Wharton's
10 report -- well, first off, the first page indicates findings and it has several
11 paragraphs. The second page, then, the second full paragraph says --
12 excuse me, before I get to that let me point out this first full paragraph.
13 "Examination of the evidence bullets, submitted as items five, six, and seven,
14 revealed that they are nine millimeter Luger caliber, full metal jacketed
15 design, and fired from a barrel with conventional rifling consisting of six lands
16 and six grooves, right hand twist." "The rifling specifications on the evidence
17 bullets," if you then go down to the second paragraph, "the rifling
18 specifications on the evidence bullets," and that's rifling specifications and not
19 anything about firing pin or anything like that - rifling specification - "on the
20 evidence bullets correspond to numerous brands of nine millimeter Luger
21 caliber semi-automatic firearms." Now, despite what Mr. Rion may feel a
22 Mac-10 is, or believe a Mac-10 is, Kevin Kramer testified that a Mac-10 is a
23 semi-automatic handgun. That's why it's included on that list. I specifically

1 said, "Is a Mac-10 a possible weapon," or whatever my question was along
2 those lines, and he said, "Yes." Okay? Referring to a semi-automatic
3 firearm. So, State's exhibit '1-M' was Todd Wharton's report. It was done
4 back in 2009. The date of his report is April 20th, 2009. The defendant was
5 indicted by the April Grand Jury of 2014. Discovery was given, including Mr.
6 Wharton's report, '1-M', on May 5th of 2014. It was placed in e-discovery.
7 Mr. Barbado, who was Mr. Rion's associate at the time and was co-counsel
8 on this case, signed up for it and things of that nature. I actually have my
9 secretary in the building if Mr. Rion does not want to acknowledge receipt of
10 that on May 5th of 2014.

11 MR. RION: We acknowledge. That's not
12 the issue.

13 MRS. KOHLRIESER: Okay. So, there's
14 that. So, again, that sentence right there says it corresponds to numerous
15 brands of nine millimeter Luger caliber semi-automatic firearms. That puts
16 him on notice that they could be talking about what brands it would
17 correspond to, which is exactly what Mr. Kramer did.

18 Now, I would also note on this report is information regarding Todd
19 Wharton. We gave in discovery the fact that Todd Wharton was now at the
20 Miami-Dade County Sheriff's Officer in Florida and gave contact information
21 for him there. Then what happened, again, prior to the defendant being
22 indicted, if you look at State's exhibit '2-M' is Heather Williams report.

23 THE COURT: I don't have '2-M'.

1 MRS. KOHLRIESER: Oh, I'm sorry. I
2 walked off with them. Sorry. '2-M'. I showed him all of these. State's exhibit
3 '2-M' is the report of Heather Williams issued on February 26th, 2014. Again,
4 Heather Williams' report was given in that same thing of discovery on May
5 5th, 2014. Again, I have my secretary out there who does this to testify in that
6 regard if Mr. Rion does not want to acknowledge that. If you look in her
7 findings she says, "The above listed items," which includes the ones we just
8 previously mentioned, "were re-examined and the findings concur with those
9 outlined in the report issued by Todd Wharton dated April 20th, 2009." Again,
10 I remind you in '1-M', under findings, includes Todd Wharton's statement
11 about matches several guns. Okay. That's '2-M'.

12 '3-M'.

13 THE COURT: I don't have it.

14 MRS. KOHLRIESER: Again, I've already
15 showed this to Mr. Rion. I gave him a copy. I think he would acknowledge
16 receiving a copy of this on September 8th. That was the exhibit list as we
17 intended it to be. I think I pointed out to the Court, and I can't recall off the top
18 of my head what number that Mac-10 is now, '139' perhaps or something
19 along that line, --

20 THE COURT: '139'.

21 MRS. KOHLRIESER: Thank you. Again,
22 it's listed 'photo of Mac-10'.

23 Then, lastly, I have State's exhibit '4-M'. I apologize, but I only have a

1 highlighted -- we highlighted it for our purposes in cross examining, or,
2 excuse me, in doing the direct examination of Joey Moore yesterday. That, if
3 you'll notice, the date on that is from March 2nd of 2009. Again, that was a
4 report that was included in that discovery given to the defense on May 5th of
5 2014. If you'll look at the very bottom of that report -- well, maybe the next to
6 the last paragraph or the last paragraph - I apologize, I don't have a copy in
7 front of me, that was the only one I had in my file at the time - Joey Moore
8 specifically references hearing this defendant discussing a Mac-10.

9 Okay. Now, again, your Honor, I guess I would ask before I go on if
10 Mr. Rion, again, without having to testify, would acknowledge receipt of the
11 foregoing items that I just gave you, items '1-M, 2-M', '3-M', and '4-M'.

12 MR. RION: Yes, of course.

13 THE COURT: Mr. Rion?

14 MR. RION: Yes, that's right.

15 MRS. KOHLRIESER: On the respective
16 dates that I listed?

17 MR. RION: Sure.

18 THE COURT: Okay. One, two, and four
19 were in discovery and '3-M' was provided the day that trial started. That was
20 my understanding. Mrs. Kohlrieser; correct? '1-M', '2-M' and '4-M' were
21 provided in discovery and '3-M', the exhibit list, was provided the day the trial
22 started? Correct?

23 MRS. KOHLRIESER: Yes. Yes. One

1 other thing that Mr. Rion has addressed and, again, my secretary is here if
2 need be, was the timeliness of Mr. Kramer's report, which is State's exhibit
3 '138', I think.

4 MR. RION: I'm not disputing that.

5 MRS. KOHLRIESER: And that was on
6 August 11th.

7 MR. RION: That's fine.

8 THE COURT: Okay.

9 MRS. KOHLRIESER: So, --

10 MR. RION: But, I also would state that I
11 believe the Court set expert report deadlines prior to the Rule 16 deadline
12 timing.

13 MRS. KOHLRIESER: You did set, I
14 believe, either a February 27th or a March 27th deadline way back when and
15 that's when we were having the April trial. The State and the defense have
16 since then given all kinds of things back and forth, including his expert's
17 report on G.S.R. So, with that said, -- and, again, also I had Mr. Kramer
18 explain, and we explained this to Mr. Rion awhile ago as well, why Kevin
19 Kramer was necessary. I can get Heather Williams out of her death bed, if
20 necessary, and bring her in here to talk about her report. I will fly Todd
21 Wharton from Miami here, if that's an issue.

22 THE COURT: Okay. How about we zero
23 in on the Motion for the Mistrial and whether you think a mistrial is appropriate

1 or not?

2 MRS. KOHLRIESER: Thank you. All right.

3 So, here's the thing, your Honor. If you look at, and I have a number of cases
4 that I brought for you, and I also provided these to Mr. Rion prior to going on
5 the record today, they are State -vs- Opp, 2014 Ohio 1138 out of the Third
6 District, State -vs- Fetty, 2012 Ohio 6127 out of the Eleventh District, and
7 State -vs- Proby, which I believe Mr. Rion has referenced, out of --

8 THE COURT: Franklin County.

9 MRS. KOHLRIESER: -- Franklin County.

10 Thank you. It's 2015 Ohio 3364. Now, what those cases discuss and, again,
11 under various factual circumstances, specifically about Rule 16(K), and the
12 purpose of the rule is, "To avoid unfair surprise by providing notice to the
13 defense and allowing the defense an opportunity to challenge the expert's
14 findings, analysis, or qualifications possibly with the support of an adverse
15 expert who could discredit the opinion after carefully reviewing the written
16 report." Okay. Now, he could have asked, again, on each of those reports
17 their names, the address there, and some of them have e-mails, phone
18 numbers and things like that. These are all three professional witnesses.
19 Each and every one of them at any time would have spoken to him. Again,
20 this Court has ruled time and time again and the Third District has upheld
21 time and time again about laboratory notes and things they use in reliance in
22 making their findings and conclusions and that they do not have to -- that's
23 not part of Rule 16. The Court can order them to be given. That's exactly

1 what happened in our G.S.R. instance. Okay. He wanted all - and I don't
2 know what they're called, I apologize - but, he basically wanted all these
3 G.S.R. notes and they were all given to him. In looking at these various
4 reports of the experts - and, again, Kevin Kramer wasn't involved until late
5 July/early August in this case, this year - he could have at any time requested
6 additional information. He could have called them on gone through line by
7 line in the report and said, "What's this mean? What's this mean? What are
8 you referring to here? What kind of weapons are we talking about?" At that
9 point I'm sure they would have said, "Oh, there's this," whatever it's called,
10 the G.R.C. or whatever it happens to be, and that type of thing. If he wanted
11 that list we could have facilitated that. Or, he could have filed a Court order
12 for that list and the Court could have compelled it or not, whatever you felt
13 was appropriate, or he could have subpoenaed it, just like he subpoenaed
14 other records in this case. So, it's a part of the notes. It's not something that
15 has to be given in Criminal Rule 16.

16 There wasn't any kind of unfair surprise. Because Mr. Rion, or his
17 associate, or one of his many investigators who have spent many hours
18 researching this case, didn't go down that route - well, we can't help that. It's
19 not our job to help that. They've known all along that we intended to use Joey
20 Moore in this case. They've known that.

21 Again, Carlotta Williams -- and I will grant you that a lot of what
22 Detective Clark did in this investigation didn't go towards that Mac-10. But,
23 again, that doesn't somehow mean when other eyes go looking at it or things

1 of that nature that somehow now that's got to be some kind of a discovery
2 type thing. I'm sure Mr. Rion's come up with all kinds of things that Detective
3 Clark didn't come up with as well. Just because that wasn't in reports of
4 various things he's tracking down I can't help that he's hung his hat on
5 whatever theory he's hung his hat on. There was ample time to address this
6 issue.

7 I would also note that the opinion is whether it came from this firearm.
8 The opinions rendered in this case were that the casings matched each other,
9 or, they were fired from the same weapon, I should say, and that the bullets
10 were fired from the same weapon. Okay? Not that the bullets were fired from
11 these casings or that type of thing, but that the bullets were fired from the
12 same weapon. It's the bullets that have the rifling on them and it's the bullets
13 that can be fired from multiple types of weapons. That's not an opinion.
14 What their rifling is, the six lands and six grooves and right twist type of thing,
15 that's a fact. The opinion is whether they match each other. The opinion is
16 whether they came from the firearm that was submitted. All along Mr. Rion is
17 absolutely correct that we do not have the firearm in this case. It's our
18 position that the defendant got rid of it somehow. That's our position. Okay?
19 So, we're not talking about some opinion that was hidden from him. He
20 wasn't ambushed or thwarted in this investigation - he, being the defense - as
21 the language of those three cases that I gave you uses. Again, there's no
22 unfair surprise here. It's unfair. Did he have the opportunity to pursue this?
23 Is he put on some kind of notice about this? He absolutely, positively has

1 been in less than a month of the defendant being indicted he's been put on
2 notice of this.

3 Furthermore, as to the fact that the two guns found at the house
4 weren't the murder weapon, I don't think it would come as any kind of surprise
5 to the defense that the State would be interested in what all kinds of weapons
6 it could be then. What are we talking about here? That type of thing. And,
7 that Kramer might have info. relevant to the types of weapons. He's a
8 firearms expert. As well as the Weapons Under Disability count. Now, they
9 go to both the Aggravated Murder and the Weapons Under Disability. Again,
10 just because he didn't make those connections in Joey Moore's statement
11 and the thing there, again, is not our fault. As I said yesterday, you know, if
12 the expert can't go beyond the letter, the actual words of his report, then
13 there's no point in having him testify. It's to explain that. They're put on
14 notice about the summary of his findings. You're given a summary of his
15 findings. It doesn't say you have to list his findings. I would liken it to, say,
16 DNA. I think that's one of the examples that Mr. Rion used. As this Court is
17 well aware from the numerous cases that we've had involving DNA, DNA is
18 determined by alleles, those fifteen points that you've seen the numbers are
19 twelve, thirteen, eleven, and all that kind of stuff. I won't bore you with that.
20 But, again, that's not something that is required in discovery to give those
21 allele charts, even though they make them, and it's the basis for them making
22 their conclusion about whether they can be included in the profile or not.
23 Again, if they make a Motion to get those notes and the Court so rules, well,

1 then they can get those notes. But, it's not required by 16 (K) and it doesn't
2 mean that the experts can't go into 'well, how can you say that it is'. "Well,
3 look here. This allele is this, and this allele is that." That type of stuff. So, it's
4 the same type of thing you have here. It's a summary - not a script. We have
5 given that time and time again.

6 As to, well, should the Court find that we have a discovery violation
7 here -- and, again, the only other discovery violation that's been present in
8 this case was the thing with the casings, the thing with England, that we've
9 already addressed. I've already stated how that came about and what we did
10 in response to that and that type of thing. I'm not going to go into that again.
11 Now, this. Again, and I think Mr. Rion would acknowledge, and maybe he
12 already has and I missed it, throughout this as we were showing -- I mean,
13 Mr. Rion is into double letters already. We have a hundred and seventy some
14 exhibits at this point. As we do it we try to hand each other them. Sometimes
15 in the moment when you're up there and doing it, well, it's not meant to
16 surprise him. It's not meant to be 'ah ha, we're going to put this up here
17 without showing you that'. I mean, there's been numerous things that he's
18 barely shown me and then flown up there with. That's fine. I'm not
19 complaining about it. If I want to look at something further I'll go, 'hey, I'm
20 sorry, can I take a look at that'. Again, as Mr. Miller was showing the exhibit
21 to the witness first and walking to the screen to put it up, he could have said,
22 'wait just a minute, let me see that', or something along those lines. Again,
23 you'll see on that exhibit list that it specifically references that we're going to

1 show that to C. Williams. The only C. Williams in this case is Carlotta
2 Williams.

3 Lastly, with the remedy. Should this Court find there's a discovery
4 violation 16 (L), and all those cases talk about it, it's your discretion, using the
5 least restrictive sanction necessary to effectuate the result, which means
6 giving him time to look at it, granting a continuance, or a mistrial. Again, first
7 off, I don't believe in any way, shape, or form, given all the documents I've
8 provided and the acknowledgements that have been made, that the State has
9 not complied with Rule 16 (K) first. But, even if it has, the stuff that Mr. Rion
10 is talking about with the firing pin and things of that nature, well, the opinion
11 only goes to the rifling and the bullets and not the firing pin marks on the
12 casings. The opinion goes to the rifling of the bullets, which is totally different.
13 We never said those bullets came out of those casings, or what have you.
14 So, that's what we're talking about here. He's had every opportunity.

15 I do note that I find that that talismanic language that he just tried to
16 use as the ineffective assistance of counsel, again, is just beyond belief. Mr.
17 Rion has gone above and beyond and crazy on this case. I have seen
18 nothing but him and the people helping him in this case going full blast, full
19 on, catching things and doing things, talking to people, investigating things,
20 and working this case like a dog, for lack of a better term. I've seen it first
21 hand. I've seen his investigators out there, as I noted to the Court before.
22 So, to say that this one piece of this huge picture is so prejudicial that he's
23 rendering ineffective assistance of counsel or something of that nature is

1 preposterous and I think really it's just a talismanic use of the language.

2 THE COURT: Okay. Thank you. Briefly,
3 Mr. Rion, any final response?

4 MR. RION: Just briefly. As it relates to the
5 last comment, I've told the Court I was put on surprise. I would agree that I've
6 worked like a dog on this case, which would show or only prove why this was
7 a surprise to me.

8 We've asked for the G.S.R. The Court's seen what we've requested
9 and the multiple Motions we filed so we could get that so we could adequately
10 prepare for that.

11 Either we can agree to it on a proffer, but the State's exhibit that talks
12 about Joey Moore's testimony, well, the Court needs to understand the first
13 time he was interviewed he talks about this Mac-10. Two weeks later he
14 goes in for a taped interview with the detective and the detective, well, they're
15 in a room and it's nine ten, and maybe I should mark it, but at nine minutes
16 and ten seconds into the interview Joey Moore's talking about trying to find
17 the gun. Detective Moore, or, Clark, "this is a black and silver nine; that's
18 what we're looking for." That was his statement. It was discounting -- even
19 the detective at that point discounted that the Mac-10 had anything to do with
20 it.

21 I want to show the Court -- if you Google Mac-10 and simply pull up a
22 picture of it, this is what -- can I just show the Court?

23 THE COURT: Yea.

1 MR. RION: That's what a Mac-10 looks
2 like.

3 MR. MILLER: Let me see it.

4 MRS. KOHLRIESER: I'm going to defer to
5 Mr. Miller on this because he knows guns way better than I do, Judge.

6 MR. RION: There's a couple of things. I
7 don't know if I can put this --

8 MRS. KOHLRIESER: Just lay it up there.
9 It might actually work. You can zoom in.

10 MR. RION: So, this is a Mac-10 itself. It'll
11 say that it's a machine gun. Mac stands for the guy, or, the manufacturer of
12 the weapon back in the sixties during the Cold War. Essentially the
13 government wanted an automatic machine gun that you could carry in a
14 briefcase to protect in clandestine situations. This suppressor is there -- if
15 you take the suppressor off -- it's threaded so that you can put the suppressor
16 on. This weapon itself is illegal and you need a special permit to own this
17 weapon. It's not something you can go and buy in the store. That's what a
18 Mac-10 is. So, when Joey Moore is talking about a Mac-10 and the detective
19 is saying that they were looking for a black and silver nine, and everything
20 else doesn't seem to indicate that a Mac-10 is anyone's thought on this, that's
21 why I'm at a complete surprise, but now they're trying to indicate and draw
22 connections with a Mac-10 in this case. Now, for the Court's information,
23 there's later knock off versions of it that, you know, have various words on it.

1 So, that's the surprise issue. That's the Joey Moore issue. The Court
2 understands my argument. The opinion in this case -- there are conclusions
3 drawn and an analysis done that was testified to that wasn't provided in the
4 report. That's my argument.

5 MRS. KOHLRIESER: Your Honor, just a
6 brief follow-up and Mr. Miller is going to show you what we have. But, the
7 whole thing with the Mac-10, again, when Carlotta Williams actually puts one
8 in the defendant's hand, and we hadn't heard that either until we prepped her
9 for trial, and the defendant could have easily talked to her beforehand too, or
10 his investigators. "Have you ever seen Markelus with any other gun?" The
11 fact that we're looking for a black and silver nine, there are black and silver
12 Mac-10 nine's out there in the world potentially. People can paint stuff.
13 Anyhow, Mr. Miller has a picture of what we have and I'll let him speak as to
14 the Mac-10 part.

15 THE COURT: Well, you've already shown
16 me a picture of what you have. It's an exhibit.

17 MR. MILLER: Okay. Well, I've got a little
18 different take on it. Since we're going off and we're straying off into websites
19 and things, --

20 THE COURT: Well, we're getting pretty far
21 and I don't want to stray too much farther.

22 MR. RION: The relevance is just to my
23 surprise. It's not to --

1 THE COURT: There are different styles of
2 Mac-10's; is that fair to say?

3 MR. MILLER: Yes.

4 THE COURT: Okay.

5 MR. MILLER: And the manufacturer of
6 this, I think, was a Masterpiece Arms.

7 MRS. KOHLRIESER: Masterpiece and
8 Cobray.

9 MR. MILLER: Okay. Yea. But, the one I
10 knew about was Masterpiece. If you pull up Masterpiece Arms on the
11 Internet, since we're going the Internet route, and you look at the pictures, or
12 if you just Google that and click on the images, you see something like this.
13 Okay?

14 THE COURT: Okay.

15 MR. MILLER: Which is almost identical to
16 '139'.

17 THE COURT: All right. Does anybody
18 know on this Defendant's exhibit 'HH', the hundred and thirty-one results of
19 the types of nine millimeters, well, how many of these would be called
20 Mac-10's?

21 MR. MILLER: There's two manufacturers.
22 Masterpiece Arms is one.

23 MRS. KOHLRIESER: That's on page four

1 of six.

2 MR. MILLER: By the way, Mac-10 is kind
3 of a generic term. Masterpiece Arms, which is why you kind of need a
4 picture, because there are very different variations. It is sort of a generic
5 term, like the term Kleenex; okay? There are two. There's Masterpiece Arms
6 and then there's one other called, I think, Cobray.

7 MRS. KOHLRIESER: Cobray, also known
8 as, I believe, FJM.

9 MR. MILLER: Cobray has switched --
10 they've been bought out and switched a number of times. But, for all intents
11 and purposes, you may see different manufacturers, but there's really only
12 two.

13 THE COURT: Okay.

14 MR. MILLER: Because Cobray has been
15 bought.

16 MRS. KOHLRIESER: FMJ. Sorry.

17 THE COURT: That's all I needed to know.

18 FMJ - (Cobray)?

19 MR. MILLER: Yes.

20 MRS. KOHLRIESER: And originally the
21 Mac-10 was designed as a fully automatic weapon. However, when those
22 were outlawed various manufacturers started making them semi-automatics
23 to comply --

1 MR. MILLER: Actually the semi-automatic
2 ones were banned because they could be converted.

3 THE COURT: There's no -- I don't know if
4 that's evidence. I'll take your word for it. I don't know.

5 MRS. KOHLRIESER: Just going to his
6 need for his expert and his continuance and things like that is what I mean by
7 that.

8 THE COURT: One last inquiry. I don't
9 know - I think I asked it, but I don't know if I heard an answer. Do you know
10 the availability of the expert you consulted with?

11 MR. RION: I don't. I could try calling him
12 again just on that limited issue.

13 THE COURT: Okay.

14 MR. RION: Whether there's a -- well, now
15 I know for the first time, Masterpiece and Cobray. I didn't know that
16 yesterday. Now I know this. First time. On that list those are the two they're
17 talking about - to show you how little I'm aware of what they're trying to --

18 THE COURT: Okay.

19 MR. RION: The bullet action, just so you
20 understand, it's not just a simple issue. The way the casing ejects out,
21 depending on the model, sometimes it leaves a scrape or a dent on the
22 casing the way it ejects. If we can limit it to two models then we could
23 compare those casings, I mean, to see if there's -- I mean, there's so

1 many ways to limit the list here.

2 THE COURT: Well, check on your expert.

3 We'll take a short recess. Check on your expert's availability, if you can. I'm
4 not saying that's necessarily the only thing that will determine my decision.

5 But, it's one consideration I want to give in trying to take into consideration all
6 of the circumstances. So, we'll stand in recess. It shouldn't take real long.

7 So, let me know as soon as you hear.

8 (WHEREUPON, COURT WAS IN RECESS.)

9

10 THE COURT: Just for the record then, we

11 are back on the record in CR2014 0139, State of Ohio -vs- Markelus Q.

12 Carter. The defendant is present with counsel. The State is present through

13 Assistant Prosecuting Attorneys Miller and Kohlriseser.

14 We just took a short break. Mr. Rion, I had asked you to see if you
15 could contact the expert that you had consulted with over the evening. Do
16 you want to just place on the record the status of that?

17 MR. RION: Your Honor, I spoke to him last

18 night. I already told the Court that he stated that he believes he would have

19 relevant information that would contradict what's been testified to. In

20 attempting to contact him today, he may be in Court in the State of Virginia.

21 He may be otherwise disposed. So, I was not able to answer the Court's

22 question. I did ask him last night as far as availability and he sort of got side-

23 tracked. In his mind his question was, 'well, let me see all the reports so I can

1 judge it where I'm headed here'. So, we got off on that tangent. We sent him
2 all of the reports yesterday. I'm waiting to hear back from him. I do not know
3 if he is engaged in testimony or is otherwise indisposed in the State of
4 Virginia. This expert, David Townsend, practices out of the City of Lansing in
5 Michigan. We are waiting -- I left my phone on so I could see if he called
6 back, but I have yet to hear back from him. I'm telling the Court that his input
7 and his advice would be very beneficial to the defense and necessary on the
8 cross examination of this issue. I know the Court believes that -- well, this is
9 not an insignificant issue as far as the pinning of this Mac-10 on Markelus
10 Carter. It's swaying the jury. They took notes on this issue.

11 THE COURT: Well, I don't know what the
12 jurors took notes on. They could have.

13 MR. RION: My point is --

14 MRS. KOHLRIESER: I was going to say,
15 just because they're writing, well, that doesn't mean you know what they're
16 writing.

17 MR. RION: It's a significant issue is my
18 point.

19 THE COURT: I understand that; believe
20 me. Believe me. Believe me I understand how significant the issue is.

21 I've listened to all the arguments. I've reviewed the memorandum
22 supporting, the written memorandum of the defense. I'll be honest - I haven't
23 read all the cases the State had, but I did look over the case summaries of

1 each case. I was already familiar with the Proby case because I had read
2 that in my own research last evening.

3 So, I'm going to just set the stage here. First off, I'll put for purposes of
4 this issue and not admitted for purposes of the jury's consideration unless
5 they are somehow otherwise identified and placed into evidence, like for
6 example the Wharton report, I believe, was already marked as a defense
7 exhibit, but I'll put into the record officially State's exhibits '1-M', '2-M',
8 '3-M', and '4-M' for purposes of the issue here.

9 Again, the hundred and thirty-one list of search results, the C.R.
10 something that Mr. Kramer spoke of, is Defendant's 'HH' and then there's
11 'HH-1', which apparently were provided last evening. Those, too, will be
12 admitted for at least purposes of the Motion hearing on the Motion for a
13 Mistrial. I'll reserve whether -- I don't know if anybody is going to move for
14 those to be admitted into evidence for purposes of the jurors' consideration.
15 But, at least for purposes of the mistrial motion 'HH' and 'HH-1' will be
16 admitted.

17 The first case I'll cite, and I've got some cases here and I've got some
18 reasoning behind my findings, but the first case I came upon was cited in
19 most of the cases - Lakewood -vs- Papadelis, if I'm pronouncing that right.
20 It's 32 Ohio State 3d, number one, page one. The Supreme Court held that,
21 "When contemplating a sanction for a discovery rule violation," which that's
22 basically, as I understand, the basis of the Motion for a Mistrial, it says, "the
23 trial Court must conduct an inquiry into the surrounding circumstances."

1 That's what I've attempted to do and gave everybody an opportunity to put
2 items into evidence, make professional statements, and present, so I would
3 understand, all the surrounding circumstances, which I now believe I
4 understand. I also went through the voluminous filings here to see -- and,
5 again, this is a problem and this is a pet peeve of the Court's. This electronic
6 discovery I don't like because when I see there's been discovery provided I
7 don't have it unless I can get on the computer. I didn't originally know that it
8 was under Mr. Barbado's name. I thought it would be under Mr. Rion's name.
9 It wasn't. So, I was frustrated. But, we have, I think, a record now of what
10 was provided and when it was provided. I also looked at disclosure of
11 witnesses and expert names. I went through that last night trying to get an
12 idea of what was disclosed and when it was disclosed. The file itself contains
13 the State's and the defense's compliance with discovery rules. Again, in the
14 State's case I don't always have that document right there. I wish I did. But,
15 it's available by e-discovery. I, quite honestly, don't know how you're dealing
16 with that with the Court of Appeals. If they can look on the e-discovery, too; I
17 don't know.

18 MRS. KOHLRIESER: It depends, your
19 Honor, based upon each issue and, again, the acknowledgement.

20 THE COURT: Well, that's neither here nor
21 there. Whatever you guys do, that's fine.

22 MRS. KOHLRIESER: I can only do so
23 much with my boss' wishes.

1 THE COURT: I wonder some days -- and I
2 would welcome the Court of Appeals to say, no, let's not do it that way
3 anymore; put it in the file. That would be -- but, I digress.

4 The Papadelis case also says, "The trial Court must impose the least
5 severe sanction that is consistent with the purposes of the Rules of
6 Discovery." That's paragraph two of the syllabus. Lakewood applies to all
7 discovery violations. In State -vs- Darmond, D-A-R-M-O-N-D,
8 2013-Ohio-966, an Ohio Supreme Court case, 135 Ohio State 3d, 343, says,
9 "Trials are to be conducted on a level playing field and Criminal Rule 16's
10 requirements that remedies for discovery violations apply to the defense and
11 to the prosecution equally."

12 With those ideals in mind, the Parson case I've already talked about,
13 that sets forth that three factor test that governs the trial Court's discretion in
14 imposing a sanction for a discovery violation. I've already stated those.
15 Those are in the Parson case. They're cited in about every discovery
16 violation case that I found, including the Proby case. So, I don't need to go
17 over those again. Lakewood focuses on the effectiveness of the less severe
18 sanction. That's an important factor in the Court's balancing test.

19 So, again, with those principles in mind the first thing I had to decide,
20 based upon the representations, and all the evidence, and what the file
21 contained, and the arguments, was there a willful discovery violation. So, the
22 questions I wanted the answers to, and I think I have those answers now,
23 before I made that determination, based upon what's already been presented

1 and what's been represented here, did the defendant have Joey Moore's
2 statement. I think that's exhibit '3 or 4-M' now.

3 MRS. KOHLRIESER: '4-M'.

4 THE COURT: '4-M'. That's yes. Did the
5 defendant have Wharton's report? Yes. That's all been taken care of back in
6 May of '14. Did the defendant have access to Moore, Wharton, Kramer,
7 Williams, and Williams? Yes. Did the defendant have the opportunity to have
8 a firearms expert? Yes. I know there was a consult already with a G.S.R.
9 expert. But, the fact is that there was an opportunity to have a firearms expert
10 after having Wharton and Williams' reports. And, the defendant had a list of
11 exhibits - for what that's worth. Now, the list of exhibits, obviously, was just
12 presented the day the trial started. But, those questions were all answered in
13 the affirmative.

14 So, the other questions, before I made a determination whether there
15 was a willful discovery violation I said, or, I asked myself - did the defendant
16 have information that a Mac-10 was allegedly involved in this case. The
17 answer is 'yes'. The fact that a witness, Joey Moore, said that the defendant
18 told him that he used a Mac-10, well, that was disclosed. Again, that's exhibit
19 '4-M', I believe. Now, Mr. Rion makes an argument, probably, or, perhaps a
20 very good argument - I don't know what the jurors are going to do with that -
21 as to the credibility of that statement. That's an issue for the jurors to decide.
22 It's not an issue as to whether or not it was disclosed. It was disclosed that
23 Mr. Moore said there was a Mac-10 involved and he said he got that

1 information from the defendant himself. So, the credibility is a fair issue that
2 can be addressed in a closing argument perhaps, or through other witnesses
3 perhaps. But, the answer is that the defense did have Joey Moore's
4 statement and that was discovery at least that a Mac-10 was alleged by at
5 least one witness, whose credibility may or may not be good, that a Mac-10
6 was used.

7 MR. RION: Your Honor, may I just
8 interrupt on that? The statement by Mr. Moore was never that a Mac-10 was
9 used.

10 THE COURT: All right. Let me have '4-M'.
11 Let me have '4-M'. I don't want to misquote anybody. Exhibit '4-M'. I'll just
12 quote a portion in the third paragraph. "Moore stated that he then heard
13 Carter tell Cloud that they caught him with sixteen grams of dope, but didn't
14 get the rest. Moore said he also heard Carter tell Cloud that he had a
15 disassembled Mac-10 gun at his house that they didn't find." All right. So,
16 maybe -- you're right. It wasn't that he used it, but that he had a
17 disassembled Mac-10. So, --

18 MR. RION: And then if I need to submit
19 another exhibit as it relates to Clark's statement, or, the next interview -
20 there's not a written synopsis of it, but it's on video - where they clearly are
21 moving -- they don't get into a Mac-10 --

22 THE COURT: Well, I think if Detective
23 Clark testifies you'll certainly be allowed to get into that type of information.

1 But, if you want to put that report in at this point, I understand that is going to
2 be what Clark will say. I haven't read Detective Clark's entire report. But, I
3 take you at your word that the focus may have, in that exchange, may have
4 been on a silver and black firearm. But, my point is there is notice by Joey
5 Moore's statement that was provided in discovery that there was some
6 implication here that a Mac-10 was in the possession of the defendant. I'm
7 just setting forth my reasons for my decision that I'm about to make.

8 Did the defendant have information that B.C.I.&I. considered other
9 guns as possible guns or guns that could have fired casings found at the
10 scene? That's clear from Wharton's report that was provided in discovery.
11 On page two, and it would be the second paragraph, which is one sentence.
12 "The rifling specifications on the evidence bullets correspond to numerous
13 brands of nine millimeter Luger caliber semi-automatic firearms." So, there's
14 at least notice that we know from all reports that, well, I think it was a .357
15 and a Glock at the Eureka Street address were not the weapons that fired the
16 casings. But, there's notice in Wharton's report that there are other firearms
17 from which those casings could have been fired.

18 Did the defendant have the actual list of candidate guns that Wharton
19 referred to and Kramer testified about? No. That's exhibit 'HH'. Clearly the
20 defense did not have them until yesterday.

21 The Court would find that the list of candidates of types of firearms that
22 could have shot the casings could either be exculpatory or inculpatory.
23 Inculpatory in that they could be, now that I know that there may be two

1 Mac-10's on that list, maybe they're trying to say, or, the type of brand, one of
2 the two types of brands are the type of brand of firearm that shot the casings.
3 The exculpatory nature is that there could be over a hundred and twenty other
4 types of guns that perhaps shot those casings. That's pretty clear that there
5 are a hundred and thirty-one brands on there, only two of which are Mac-10's,
6 apparently based upon the representations. I'm not a firearms expert. But,
7 that's what's been represented.

8 But, I find it's not necessarily a discovery violation not giving the
9 defense exhibit 'HH' until yesterday because Mr. Wharton's report indicates
10 that there was a list of guns that could have fired the casings that were tested.
11 The defendant knew of Mr. Wharton's report. The defendant's counsel knew
12 that Moore had said that the defendant had an unassembled Mac-10 at his
13 house. Therefore, since the defendant had Wharton's report and knew that
14 there was evidence that the casings could have been fired from any number
15 of guns, including a Mac-10, I find that failure to provide the full exhaustive
16 hundred and thirty-one list is not a willful discovery violation. It's more in the
17 nature of notes or data that supports the conclusion in Wharton's report.

18 Did the defendant have prior discovery that the State would show a
19 picture of the Mac-10? Apparently at the very earliest would be on the day
20 the trial started when the list of exhibits was provided. I find that the picture is
21 demonstrative or illustrative of what Moore said that the defendant told him, or
22 that he overheard the defendant say. Demonstrative evidence is admissible if
23 it satisfies the general standard of relevance set forth in Evidence Rule 401,

1 if it is substantially similar to an object that it is intended to represent. So,
2 under State v. Jones, 135 Ohio State 3d, 10, demonstrative evidence is
3 allowed to be used. I would cite to State -vs- Palmer, a Seventh District case.
4 It's number 89-B-28. It's from 1996. They held that the State could introduce
5 a handgun as a model to show the type of gun used in the homicide. This is
6 not necessarily a model. We don't have a three dimensional model. But, we
7 have a picture. The nine millimeter firearm -- the evidence in this case is that
8 a nine millimeter firearm was used to shoot the victim. There are fired -- the
9 evidence shows so far that there are fired nine millimeter casings found at the
10 homicide scene. The evidence so far is that unfired nine millimeter cartridges
11 were found in the defendant's house which, the evidence shows, were the
12 same brand and type that matched the casings that were fired and located at
13 the scene. We have in this case a witness who has said, whether he's
14 believable or not is another issue, a witness who has said that the defendant
15 said that he had a Mac-10. A picture of the Mac-10 was demonstrative of
16 what a Mac-10 looks like. The Court finds there's no indication that the
17 introduction of the picture of the nine millimeter Mac-10 as demonstrative
18 evidence would confuse or mislead the jury.

19 The defense had access to all B.C.I. reports. The defense had access
20 to all the witnesses. If there is a violation I think the only violation here would
21 be not giving the actual picture of the Mac-10, the purported Mac-10, State's
22 exhibit '139'. So, with that in mind, finding that there has not been any other
23 discovery violation, I'm going to exercise discretion.

1 I do have in my discretion as the most severe sanction a mistrial, which
2 is being requested. I have to have an inquiry into the circumstances, which I
3 have done, and I have taken into consideration all of the circumstances.
4 Looking at the three part test, whether the failure to disclose was a willful
5 violation, I find it wasn't willful given all the information that the defendant
6 already had. The determination of willfulness focuses on the acts of the
7 prosecution. That's clear with regard to the picture because it wasn't a law
8 enforcement picture. It was a picture, apparently, that the prosecutor got off
9 of the Internet. But, I find it wasn't a willful violation.

10 Would foreknowledge of the undisclosed material have benefitted the
11 accused? Again, the defendant had information that a Mac-10 was at least
12 mentioned. The defense had information that B.C.I. experts said there are
13 other numerous, apparently a hundred and thirty-one, weapons that could
14 have fired the casings. Not having a picture of a Mac-10, given the picture is
15 very generic and demonstrative only, and the fact that the defendant already
16 had Moore's testimony, and Wharton's report, I find that the picture itself
17 would not have benefitted the accused.

18 Whether the accused was prejudiced, I'm making a finding of 'no',
19 again, keeping in mind that the least severe sanction is consistent with the
20 purposes of the discovery rules.

21 I find that the severe sanction of a mistrial is not appropriate. So, I
22 overrule the Motion and deny the Motion for a Mistrial. The Court need not
23 declare a mistrial unless the ends of justice so require in that a fair trial

1 is no longer possible. That's State -vs- Franklin, 62 Ohio State 3d, 118. The
2 picture of the Mac-10 and the list of candidate guns -- well, the picture of the
3 Mac-10 is demonstrative. The list of candidate guns is more in the nature of
4 notes or data upon which Wharton's conclusion is based. The probable value
5 of the demonstrative evidence, the picture, is, again, just as demonstrative to
6 show what a Mac-10 could look like. I suppose, now I understand if it has a
7 silencer or whatever that thing was called on the end of it that you guys
8 mentioned and showed me the picture of, I suppose it could look like different
9 things, too. The Court concludes that the probative value of the
10 demonstrative evidence was not substantially outweighed by the danger of
11 unfair prejudice.

12 The Court gave the defense the evening to prepare for the cross
13 examination of Mr. Kramer. Mr. Rion, by his representations and arguments,
14 has shown the Court that I believe he is fully prepared. However, if the
15 defense feels needed to present an expert I will consider and take under
16 advisement a further continuance when we get to the defense case. That's
17 why I was asking about the availability of Mr. Townsend. As soon as you
18 know that availability, let me know, and we'll decide at that point whether a
19 continuance to allow Mr. Townsend to come in would be appropriate or not.

20 I also will give an instruction to the jurors in the nature of, and this is a
21 draft, but I'm just giving the nature of the instruction from some of the case
22 law I found, it will be to the extent, and it may need some tweaking and I'll get
23 input from counsel, but the instruction would be, "That the picture of the

1 Mac-10 gun was not a picture of the actual gun used in the homicide of Mr.
2 Warrington. It is demonstrative evidence. Demonstrative evidence is an
3 object, picture, model, or other device intended to clarify or qualify facts for
4 the jury." Side note - in this case I find it was intended to clarify the testimony
5 of Mr. Moore. I will further instruct them that, "Such evidence is merely an aid
6 in understanding certain facts and that it is up to the jury to decide what
7 weight to give to such evidence. The picture may be considered for the
8 limited purpose to show what a Mac-10 looks like." So, that's my work in
9 progress of the draft, but I will intend to give an instruction.

10 So, we will continue. We'll take a short break so I can get a drink of
11 water. Well, I suppose I can get one here. So, unless somebody else needs
12 a short break, I'll bring the jurors in now. Exceptions are noted for the record.
13 Are you guys ready to go?

14 MRS. KOHLRIESER: Actually, your
15 Honor, if we could maybe have five minutes just to kind of gather our
16 thoughts? I don't know if Mr. Rion wants a little bit longer. But, just to kind of
17 gather our thoughts?

18 THE COURT: All right. Let's take five
19 minutes. We'll continue with the cross examination of Mr. Kramer and
20 continue with the case. Mr. Rion, let me know if Mr. Townsend responds as
21 to his availability. I'm taking under advisement whether or not as part of --
22 well, since I didn't really find that there was a willful discovery violation it's not
23 really a sanction. But, at least a remedy for the late receipt of 'HH' and 'HH-1'

1 I will consider, perhaps, depending upon his availability, a reasonable
2 continuance to allow you to prepare him if you want to call him as an expert in
3 the defense case. All right? We'll take five minutes.

4 MR. RION: Your Honor, just for the record,
5 it's Mr. Kramer's report. It's not necessarily that they didn't give me 'HH'.
6 That would have been something that I would have had to have requested,
7 and I acknowledge that. But, in Kramer's report it gave no indication that I
8 would have any reason to be trying to get Defendant's exhibit 'HH' given his
9 conclusions. That was the gist of our argument - just so the Court
10 understands.

11 THE COURT: Kramer's report has been
12 marked. It hasn't been admitted. Assuming it's admitted, it speaks for itself
13 and what it says. Okay? All right. Thank you.

14 (WHEREUPON, COURT WAS IN RECESS.)
15

16 THE COURT: The record will show it's the
17 16th of September, 2015. We're reconvening in CR2014 0139, State of Ohio
18 -vs- Markelus Q. Carter. The record will show the defendant is present in
19 Court with his attorney. The State is present. The jurors have finally been
20 returned back in the Courtroom.

21 Ladies and gentlemen of the jury, welcome back. Again, I'm sorry for
22 the delay. I appreciate your patience. We're trying to minimize the waiting
23 that you have to do. But, occasionally there are things that come up, as I

1 explained from the very beginning, that necessitate the Court making further
2 inquiry and making certain decisions. So, that's what we were doing. Again, I
3 appreciate your patience. Please bear with us as we all try to get this thing,
4 or, keep this thing moving in an orderly fashion.

5 I did want to ask - is there any juror who has been unable to follow my
6 instructions or feels that they have been exposed either from someone else or
7 on their own to anything that would prevent them from continuing their service
8 to be fair and impartial? Nobody's raised their hand. So, we will continue.

9 As we broke yesterday the witness was Kevin Kramer. I believe the
10 direct examination had been completed.

11 MRS. KOHLRIESER: Yes, I think so.

12 THE COURT: Mr. Rion, do you wish to
13 cross examine this witness?

14 MR. RION: Thank you, your Honor.

15 **CROSS EXAMINATION OF KEVIN KRAMER**

16 **BY MR. RION:**

17 Q Good morning, sir.

18 A Morning.

19 Q Sir, you issued a report in this case; correct?

20 A Yes, sir.

21 Q And your report indicates essentially a few findings. Number one, that
22 the weapons that were found in Mr. Carter's house were not the weapons
23 utilized to kill Mr. Warrington; correct?

1 A Items that did not fire the cartridge cases or the bullets that were
2 submitted to me.

3 Q In other words, the weapons that you examined were not consistent
4 with the bullets or the casings found as coming from the same weapon?

5 A That is correct.

6 Q Secondly, that the two casings that were found there were likely fired
7 by the same weapon?

8 A Those two cartridge cases were fired from the same weapon.

9 Q Though that weapon is unknown?

10 A That is correct.

11 Q And that the three bullets that were found, or the parts of them that you
12 could see, appeared similar in nature?

13 A Those three bullets were all fired by the same firearm.

14 Q Again, that firearm being unknown?

15 A That is correct.

16 Q Okay. Now, you, yourself, did not do any measurements to determine
17 the width of the lands and the grooves; correct?

18 A Yes, sir.

19 Q And the information you -- you testified yesterday that there were a
20 hundred and thirty-one different weapons that would fall under the general
21 category of having six lands and grooves and a right hand motion; correct?

22 A That is correct.

23 Q What you meant by that is there are some vague, and I mean vague,

1 characteristics that could put a series of weapons in the same bucket;
2 correct?

3 A Six lands and grooves and a right hand twist in nine millimeters is a
4 fairly common rifling pattern.

5 Q So, that could include -- well, there was a list submitted of guns made
6 by Beretta, Calico, England, Federal Engineering, Germany, Browning,
7 Heckler, and I mean I could go through the list, but essentially every major
8 producer of nine millimeter pistols would be included in that; would you
9 agree?

10 A That is basically correct. I said right six, not only Lugers, is a common
11 rifling pattern.

12 Q And the only thing that you could exclude from that would be
13 something called a polygonal pattern that's found in I think one or two brands,
14 brand names; correct?

15 A Yes, as well as anything that's not right six. So, again, that could be
16 left seven, right into left, anything that's not number six - those could all be
17 eliminated at possibilities.

18 Q And that's an uncommon -- this is the general way in which the normal
19 nine millimeter is manufactured?

20 A Those are less common, but there are other common patterns as well.

21 Q Let me talk to you about, well, you brought up this idea of a Mac-10
22 yesterday. Do you recall that?

23 A I recall being questioned about a Mac-10; yes, sir.

1 Q Now, a Mac-10, just so everyone understands, is a military grade fully
2 automatic sub-machine gun; correct? That's what a Mac-10 is?

3 A Mac is an abbreviation standing for a Military Armament Corporation
4 and the model being 10. A true Mac-10 has a select fire option to shoot full
5 auto. or semi-auto.

6 Q And the Mac-10's require -- they have a place at the end of the barrel,
7 there's a place to put a suppression mechanism or what maybe some people
8 might call a silencer, on the end of the barrel; correct?

9 A There is a place on numerous pistols that have a threaded barrel
10 where you can screw on an attachment such as a suppressor or a
11 compensator.

12 Q That's what the Mac-10 had as one of its characteristics; right?

13 A A person can add that to one; yes.

14 Q But, the barrel is threaded to add that? It's designed so you can add
15 this suppressor to it; correct?

16 A Yes, sir.

17 Q That weapon in and of itself requires -- first of all, you can't go to a
18 store and just buy one; correct?

19 A There are tighter restrictions on being able to purchase a full auto.
20 firearm.

21 Q You would need a certain license to go, government/federal licenses,
22 to go and even possess a true Mac-10; correct?

23 A Yes, sir.

1 Q Okay. And a Mac-10, and I'm going to show you, but I didn't print it out
2 and I apologize for it, but just so the jury can see what a Mac-10 looks like,
3 that's what a Mac-10 looks like; correct?

4 A That's consistent in style and appearance of a Mac-10, I would agree.

5 Q Now, just so it's clear for the record, you, yourself, did not conduct the
6 test in which you testified to yesterday as far as the measurements that relate
7 to the possible list of weapons that could be consistent with the right hand
8 groove, et cetera; correct?

9 A We had a policy change at B.C.I. within the last year where we
10 discontinued reporting out such a list and the results thereof. So, because of
11 that policy change I did not do so.

12 Q You had a policy change so that you couldn't now create this
13 information?

14 A I still have access to the G.R.C. We have not discontinued it
15 altogether. We are re-evaluating our use of it as it has not been updated
16 since 2010. The F.B.I. is in charge of maintaining that and so we're looking
17 into other options as far as getting a more up-to-date list.

18 Q In other words, if you had done this test today you would not, as a
19 policy of B.C.I., you would not be able to testify to that; is that correct?

20 A As a policy we're not doing that. If an agency specifically requested
21 information we still have the discretion to make exceptions to that policy.

22 Q Now, what you testified to yesterday dealt with these --

23 THE COURT: Put on the record what

1 exhibit you're referring to.

2 MR. RION: Defendant's exhibit 'HH'.

3 THE COURT: Okay.

4 Q Dealt with certain measurements that were assumed, those four
5 measurements, were assumed in the creation of a list that you say that B.C.I.
6 would not issue a report on today; correct? But, those are the measurements
7 that were utilized, so you assume; correct?

8 A Again, we have discretion to make exceptions to that policy. But, this
9 is the software that I would use if I were to use it. I have used it previously.

10 Q The question is - those measurements that are in there, you don't
11 know if they're accurate or not; correct?

12 A I did not personally take those measurements.

13 Q You, yourself, did not do the measurements for purposes of
14 re-submitting. Those measurements, minimum land width of point zero seven
15 one, maximum land width of point zero eight three -- lands are like valleys;
16 right?

17 A In polygonal rifling they're more like gradual hills and valleys. In
18 conventional rifling there's going to be sharp edge shoulders.

19 Q Shoulders?

20 A So, like my shoulders, my personal shoulders would be the distinct
21 edges where one land ends and the groove starts.

22 Q Is a groove then a dip?

23 A So, in the interior surface of the barrel the lands going to be the raised

1 area and the grooves are going to be the lower areas. When a bullet passes
2 through there it's going to pick up those. So, it's going to be the reverse on
3 the bullet. The lands are going to leave a groove on the bullet. So, the land
4 impression will be the lower area on the bullet and the groove impressions will
5 be the raised area on the bullet itself.

6 Q So, land -- well, let's just call it a valley for a second; is that fair? It's
7 the depressed version part?

8 A If I were describing a polygonal barrel, a bullet going through a
9 polygonal barrel, I would call it as valley, whereas the shape going through a
10 conventional rifle is going to be more distinct with sharp turns.

11 Q Okay. Canyon. We'll call it a canyon. A depression or whatever.
12 Those measurements for the depression, the land width, you don't even know
13 if those are accurate, correct, because you didn't do them?

14 A I did not measure them; that's correct.

15 Q Nor did you measure it afterwards to confirm?

16 A No, sir.

17 Q I mean, you agree with me?

18 A I did not measure them; that is correct.

19 Q And the same with the groove marks, the upper portion? Same
20 question and same answer; correct?

21 A I did not measure them; that is correct.

22 Q Now, you testified as to this list that's contained in Defense 'HH' which
23 was given to me yesterday. The Mac-10, a Mac-10, which we saw a picture

1 of just a second ago, the Mac-10 is not on this list; correct?

2 A That is correct.

3 Q In fact, a Mac-10 is rifled for a forty-five caliber bullet; correct? The
4 Mac-10?

5 A They may make versions that are chambered for a nine millimeter or
6 forty-five. They have various versions.

7 Q But, not for a thirty-eight, though? Not for a three-eighty? In other
8 words, there's a difference between -- the military version was designed for a
9 forty-five; correct? Do you know?

10 A I believe they made a forty-five and a nine millimeter version.

11 Q Okay. But, even a nine millimeter version of the Mac-10, to your
12 knowledge, is not on this list?

13 A A specific model of Mac-10 was not on that list.

14 Q Okay. So, the testimony yesterday that a Mac-10 was determined by a
15 comparison with the list to be consistent, that statement, and I'm going to go
16 to the next point of it, but that statement would not be accurate? A Mac-10 is
17 not here; correct?

18 A I cannot specifically say a Mac-10 is on that list.

19 Q Okay. Now, you testified yesterday that there were two other possible
20 weapons that could -- well, I think your testimony yesterday was that there
21 were two Mac-10's that would fit the right hand pattern and one was a
22 Masterpiece. The creator, or, the manufacturer was something called the
23 Masterpiece; correct?

1 A Yes, sir.

2 Q Now, I showed you, or you saw in your exhibit, that list, the
3 Masterpiece Arms --

4 MR. RION: May I approach the witness?

5 THE COURT: Sure.

6 Q I'm referring to a page in Defendant's exhibit 'HH'.

7 MRS. KOHLRIESER: Which page?

8 MR. RION: Page four of six.

9 Q The Masterpiece version there does not give the model of weapon that
10 would fit with this generic right hand twist six grooves; correct?

11 A Well, what's listed here, four of six, just to clarify, is the page number of
12 the list, but it's page eleven of the notes. Masterpiece Arms is listed as a
13 manufacturer as having this rifling pattern. It does not list a specific model.

14 Q That was one of the two that you told the jury yesterday would be
15 consistent; correct? That was one of the two of them that you were referring
16 to yesterday; correct?

17 A Masterpiece Arms does produce a semi-auto. version that looks similar
18 in appearance as a Mac-10.

19 Q I understand. But, as it relates to this list, which model, which weapon
20 they're speaking of, whether it's a nine millimeter pistol or whether it's, well,
21 whatever it is, this doesn't list what it is; correct?

22 A The G.R.C. data does not provide the model.

23 Q So, you don't know whether that -- so, now, is it fair to say then in

1 looking at the list more closely that you cannot say that what they are talking
2 about here is a Mac-10 model?

3 A All I can say is that Masterpiece is on the list and they do produce a
4 firearm of that appearance. But, I can't say that model is what is listed there.

5 Q And they do also produce firearms that are not of that appearance;
6 correct?

7 A That is correct.

8 Q So, there was one other that you mentioned yesterday and that was,
9 well, the company is FMJ Cobray and they create something called a PM-11;
10 correct?

11 A Yes, sir.

12 Q Now, have you ever put a PM-11 next to a Mac-10?

13 A I have not.

14 Q And the PM-11, first of all, they don't make a forty-five caliber PM-11;
15 right? That's meant for a three-eighty or for a nine millimeter?

16 A Cobray may make a forty-five caliber version, but it's not the PM-11.

17 Q They may or may not? Do you know?

18 A They may make a forty-five.

19 Q May or may not?

20 A I don't recall specifically, but I generally recall that, well, I think they do.

21 Q All right. And this PM-11, well, some people call them M-11's right?

22 A Someone may call it an M-11.

23 Q And it is a -- a PM-11 is simply a non-military version of a -- a PM-11 is

1 a nine millimeter. Is it semi-automatic or fully automatic?

2 A It's designed to be semi-automatic only.

3 Q Okay. It's not a -- a Mac-10 is a PM-11; right? I mean, that's what it
4 is?

5 A The model number would be a PM-11 - not Mac-10.

6 Q Now, of the other hundred and thirty now other possible -- first of all,
7 did you take a PM-11 and do measurements of the lands and grooves of the
8 PM-11?

9 A I have not.

10 Q Did you see how the shell casings eject from a PM-11?

11 A I have fired a PM-11 previously.

12 Q Did you analyze the shell casings -- well, did you do any cross analysis
13 with a PM-11 in this case?

14 A No, sir.

15 Q So, if I put up a hundred and thirty different pictures of weapons, every
16 single one that's on this list, and I'm not going to do it, but if I did you would
17 have to say, 'yea, that would be consistent, that would be consistent, that
18 would be consistent, and that would be consistent'; correct?

19 A Every one on that list would be consistent with being a right six and a
20 nine millimeter.

21 Q Again, you can't even, I guess, testify today -- well, to that point, as an
22 expert you do not have any firsthand knowledge as to the veracity or possible
23 mistaken belief that the information that you're referring to -- in other words,

1 you can't state firsthand whether or not there are any similarities to -- let me
2 withdraw the question and say it another way. There's a window, say point
3 zero seven one to point zero eight three, for the width of the land as an
4 example; right? That's what's stated here?

5 A Generally when we do a search we're going to give ourselves some
6 wiggle room so there may be some slight variation in how the F.B.I. may have
7 measured those and maintained the data base. If a bullet is damaged we will
8 offer some wiggle room. We're talking thousandths of an inch differences,
9 just to account for some variation between damage, how the F.B.I. may have
10 measured, how another examiner may have measured, just to account for
11 that slight variation that can occur.

12 Q And we're talking almost a microscopic level with these? I mean, for
13 you to get the fingerprint or the identify of a bullet in a case requires
14 microscopic analysis; right?

15 A When we examine a bullet we use a microscope and we measure
16 lands and grooves we are doing so under the microscope.

17 Q So, there's a window here of these measurements that you don't know
18 whether they're accurate or not, as you've testified; correct?

19 A I have not personally measured the lands and grooves; that's correct.

20 Q If that window were narrowed then certain weapons that are on this list
21 could be excluded; fair?

22 A You can look at the measurements that are provided for each model
23 and see if narrowing it would eliminate them or not.

1 Q So, in this situation we've given information to the jury about results
2 that you can't verify, and if we were to narrow that window, essentially certain
3 weapons on this could be actually excluded and the list from one thirty-one
4 could be down to one-ten, or eighty, or fifty; correct?

5 A I would have to look at the measurements and determine how many
6 could narrow it down by. But, it's possible that it could narrow it down further.

7 Q Now, Remington is a common manufacturer; correct?

8 A Yes, sir.

9 Q Like, you can walk into an ammo. store and there's shells of
10 Remington bullets in almost every store you go into; correct?

11 A Probably so; yes, sir.

12 Q Is it one of the most common?

13 A Remington is a common manufacturer of ammunition and firearms.

14 Q Remington makes, well, would you estimate millions or billions of
15 rounds a year of ammunition?

16 A I would agree with that; yes, sir.

17 Q And a nine millimeter is a very common type of bullet; correct?

18 A Nine millimeter is a popular cartridge; yes.

19 Q So, the bullets that you looked at in this case, it's a common
20 manufacturer, a common brand, a common make, and a common model of
21 bullet; fair?

22 A The cartridge cases were a Winchester brand. I cannot specifically
23 say the brand of a bullet just from looking at a bullet necessarily.

1 Q But, the question was - my question was simply that what you
2 analyzed in this case, the cartridges -- the bullet itself you can't, you didn't,
3 you don't know what the brand of the bullet was.

4 A The fired bullets that were collected from the scene there's really no
5 way to determine the manufacturer of the bullet. The cartridge case has
6 stamped on it Winchester. The live rounds, the cartridges of ammunition, the
7 complete unit of ammunition with the bullet and cartridge case, the powder
8 and primer, those were stamped as Winchester.

9 Q Right. And that's a common make, a common model, and common
10 brand of cartridges that were looked at in this case; correct?

11 A Yes, sir.

12 Q And then the bullet, -- I guess what you're trying to tell the jury is
13 whether or not those bullets came from those cartridges you don't know.

14 A I can't say.

15 Q All you can say is those three bullets were fired from a similar weapon
16 and those two cartridges were fired from a similar weapon, but whether that
17 was the same weapon you don't know.

18 A I can't scientifically say that; no.

19 Q Thank you.

20 THE COURT: Okay. Any redirect by the
21 State?

22 MRS. KOHLRIESER: Yes, just a little bit.

23 Thank you.

REDIRECT EXAMINATION

1
2 **BY MRS. KOHLRIESER:**

3 Q Kevin, I'm going to ask you to bear with me just a little bit. Kevin, you
4 were asked about some measurements that were taken and things of that
5 nature. I believe it was Defendant's - I'm sorry, I'm a little shorter than Mr.
6 Rion -- Defendant's exhibit 'HH' there. Do you remember that when Mr. Rion
7 put on here and showed you those measurements?

8 A Yes, sir. Yes, ma'am. Sorry.

9 Q I've been called worse. That's okay.

10 A Out of habit. Sorry.

11 Q You said it was Heather Williams that had made those measurements?

12 A Heather Williams measured those bullets, as well as Todd Wharton did
13 previously.

14 Q Okay. Now, I believe you testified to this previously, in making those
15 measurements and things like that and reporting out such as you, or Heather,
16 or Todd would have, does it go through peer review?

17 A Yes, ma'am.

18 Q Does it go through a supervisory review? A technical review, I guess
19 is what it's called.

20 MR. RION: I'm going to object. I don't
21 know if he has any personal knowledge of this specific testing. Unless he has
22 personal knowledge of it.

23 THE COURT: Okay. All right. It's

1 sustained. Lay a foundation or rephrase.

2 MRS. KOHLRIESER: Okay.

3 Q Does it reflect in the notes and in the report whether those went
4 through review?

5 MR. RION: Same objection.

6 THE COURT: Overruled.

7 A Yes, ma'am.

8 Q And do yours go through a similar review?

9 A Yes, ma'am.

10 Q And is that, in fact, a B.C.I. policy?

11 A Yes, ma'am.

12 Q Okay. Now, when you testified yesterday regarding possible firearms
13 and even on cross examination today about possible firearms, well, based
14 upon your review of those documents did you have any reason to question
15 them before testifying in the manner that you did?

16 A I had no reason to question the measurements taken by Heather or
17 Todd.

18 Q Okay. Thank you. Now, you used a term on cross examination 'a true
19 Mac-10'. Mr. Rion showed you a picture. I'm going to ask Mr. Rion if he
20 could indulge me a moment if I could use that picture again.

21 MR. RION: Just don't call my wife.

22 MRS. KOHLRIESER: It's on your phone.

23 Q What we have up on the screen here, for demonstrative purposes only,

1 I believe that's what you testified was a true Mac-10 - your words?

2 A I believe I said it was similar in appearance to a Mac-10.

3 Q Okay. Let me ask you about this, well, what appears to be some kind
4 of extended barrel here. Do you see what I'm talking about?

5 A Yes, ma'am.

6 Q Can you tell if that's just the way it's made, or is that something on it?

7 A I would assume that's an attachment on the barrel as we've described,
8 the threaded barrel that is common to these pistols.

9 Q Okay. So, you could take, for instance, this part off?

10 A Yes, ma'am.

11 Q And I think you used the term suppressor. Would that be an
12 attachment?

13 A A suppressor is something that can be attached to a barrel.

14 Q What is a suppressor?

15 A A suppressor is designed to reduce the noise made by firing the gun.

16 Q Okay. And I think you used the word compressor. Does that sound
17 right?

18 A I also said compensator.

19 Q A compensator? Okay. What's that?

20 A So, as I've described how a firearm functions, when you fire all the
21 pressure that's pushing the bullet down the barrel and towards the target is
22 also pushing back on the firearm. You may have commonly heard someone
23 refer to a firearm kicking, or the recoil of the firearm. A compensator is

1 something that allows for some of that excess gas to be released to reduce
2 the felt recoil by the shooter.

3 Q Okay. When you say suppressor and you're talking about reducing
4 noise, have you ever heard the term silencer?

5 A Yes, ma'am.

6 Q Okay. Are those different or similar?

7 A They're interchangeable as far as terms.

8 Q Okay. So, if I watch a movie and someone talks about putting a
9 silencer on their gun, the technical name is suppressor?

10 A I would commonly think of a suppressor, but someone may call it a
11 silencer as well.

12 Q Okay. So, you may call it tissue and I may call it Kleenex or
13 something?

14 A It might be technical since that would essentially make it silent. I would
15 just be more aesthetically correct and call it a suppressor.

16 Q Gotcha. Okay. I see what you're saying now. I believe you testified
17 on cross examination that the true Mac-10, the military grade fully automatic
18 weapon, isn't on that list, 'HH'; correct?

19 A That is correct.

20 Q Let me ask you this - let's use my examples there - if I were to say 'can
21 you hand me a Kleenex', what would you do?

22 A Grab the Kleenex and hand it to you.

23 Q You'd hand me one of those tissues; correct?

1 A Yes, ma'am.

2 Q Look at this box. Feel free to pick it up and look at it. Did you actually
3 hand me a Kleenex?

4 A It's labeled as a Crystal Ware two-ply soft tissue.

5 Q Kleenex is the name brand; correct?

6 A Yes, ma'am.

7 Q So, when you say words like 'true Mac-10' and I use the word, me, not
8 being any kind of gun expert by any stretch of the imagination use the term
9 'Mac-10', does that mean necessarily in your opinion that I'm referring to a full
10 military grade 1960's design Mac-10?

11 A You could be referring to that or just commonly the design and
12 appearance of a Mac-10.

13 Q So, is it similar to the overuse of the word Kleenex?

14 A I would say it's similar; yes.

15 Q Okay. Someone may say rollerblading when it's actually in-line
16 skating?

17 A Yes, ma'am.

18 Q Sorry. I'm looking for my exhibit. I'll move on to another question for a
19 moment. You were asked about the fully automatic version of a Mac-10
20 requires federal things you've got to go through and stuff like that; correct?

21 A There are more restrictions on acquiring such a firearm; yes.

22 Q Okay. Is there a version of a semi-automatic commonly referred to as
23 a Mac-10 that's commercially available?

1 A There are versions that are semi-auto.'s that are based off the Mac-10
2 design.

3 Q Okay. When you say based off of, when you say based off, well, do
4 they look like it or are you talking about something else?

5 A They look like it and function similar to it.

6 Q Now, you were also asked about this list. I just want to make sure that
7 we're absolutely clear here. B.C.I.'s policy at this point is not to take those
8 measurements and look at the list of candidates?

9 A That is correct.

10 Q However, if I were to call you up and say, "Hey, Kevin, we kind of need
11 this; can you do this for us," would that be available?

12 A Yes, ma'am.

13 Q So, they don't prohibit you from doing it?

14 A Correct.

15 Q Okay. And, again, just so I understand, you said that it hadn't been
16 updated since 2010?

17 A That is the reason we have temporarily decided not to continue using
18 it.

19 Q And by updates do you mean more guns have been made and styles
20 have been made since 2010 that are not on the list?

21 A The F.B.I. maintains this data base. Every time a new model of firearm
22 is made they are to measure that firearm and add it to the data base.

23 Q Do you know whether that's the only reason, or was there any problem

1 with the measurements that the F.B.I. were taking and things weren't
2 accurate?

3 A I'm not aware of any issues with their measurements. I can only say
4 we've discontinued using it temporarily for the sake of it not being updated
5 recently.

6 Q Now, in the spectrum of what someone may call a Mac-10, do all of
7 them have threaded barrels so you can add those attachments?

8 A They don't all necessarily have them, but I would say many do.

9 Q You were also asked about, and I'll just hand it to you so we can make
10 sure, but page three of six on Defendant's exhibit -- well, is that 'MM' or 'NN'?

11 THE COURT: I think it's 'HH'.

12 MR. RION: It's 'HH'.

13 MRS. KOHLRIESER: 'HH'? I completely
14 changed letters. Sorry.

15 Q 'HH'. I'd ask you to take a look at that. You were asked about this
16 PM-11; correct?

17 A Yes, ma'am.

18 Q Okay. Are you familiar with PM-11's? Have you ever seen one? Fired
19 one?

20 A I have fired a PM-11 previously.

21 Q Okay. And do they look similar to the picture you were shown
22 yesterday as to identifying a Mac-10 by the State, exhibit '139' I believe it
23 was?

1 A The shape and appearance of the PM-11 would be similar.

2 Q Okay. How would you go about telling the difference from a visual
3 inspection?

4 A The differences are going to be fairly subtle when you would have
5 them side by side. I may even need to take it apart to find some differences.

6 Q Okay. So, someone like myself or some other person that doesn't
7 know guns very well, could they mistakenly call a PM-11 a Mac-10?

8 MR. RION: Objection.

9 THE COURT: Overruled.

10 A I would say so; yes.

11 Q From a distance could you, yourself, perhaps make that mistake?

12 A I think it would be difficult to tell from a distance.

13 Q And by distance I mean a reasonable distance. I don't mean a football
14 field away. But, you know, say someone had one in this room, in the gallery
15 or something. Would it be difficult for you to tell what they were holding?

16 A Without examining it up close it would be difficult for me to tell from this
17 distance.

18 Q But, depending upon the way they were holding it could you give some
19 kind of description of it?

20 A Yes, ma'am.

21 Q Do you think you would be able to say, well, it looks similar to a, and fill
22 in the blank, gun?

23 A Yes, ma'am.

1 Q If, and I'm just going to say it's commonly referred to as a Mac-10,
2 whether it's a PM-11 or what have you, the Masterpiece version of that had
3 been fired and not had a suppressor on it would you expect someone to be
4 able to hear that being shot?

5 A Yes, ma'am.

6 Q Again, within a reasonable distance.

7 A Yes, ma'am.

8 Q I don't mean someone in Michigan hearing it here in Lima. Do you
9 know by chance, in your experience with the PM-11, whether it ejects to the
10 left or to the right?

11 A The port that the cartridge is ejected is on the right side of the pistol.
12 So, generally speaking they should eject to the rear and to the right.

13 MRS. KOHLRIESER: Give me just a
14 minute.

15 (WHEREUPON, Court went off the record briefly.)

16 Q I just want one point of clarification. I mentioned peer review. I'm
17 going to have you explain that. What is peer review and technical review?
18 What do those mean?

19 A So, after I've completed my examination another examiner in the
20 firearm section who has the technical expertise as I do will review my notes
21 and make sure they're consistent with the findings that I'm reporting out.
22 Once they've approved that it will then go on to an admin. review where a
23 supervisor will review it for grammar or some administrative issues. If none

1 of those are present the report is approved and submitted.

2 Q So, the peer review is really a substantive review versus the technical
3 review?

4 A The technical review is more in-depth - someone of my technical
5 expertise is looking at it. The admin. review is simply more for grammar or
6 administrative errors.

7 Q Okay. Sorry. I apologize. I got those mixed up. So, the admin.
8 review, well, you mean an administrative review?

9 A Correct.

10 Q And, again, you said that's more like spelling or make sure you have
11 the right case number or things of that nature on it?

12 A Correct.

13 Q Okay. Thank you.

14 MRS. KOHLRIESER: Nothing further, your
15 Honor.

16 THE COURT: Any other questions, Mr.
17 Rion?

18 **RECROSS EXAMINATION**

19 **BY MR. RION:**

20 Q The picture that you were shown yesterday, do you know what the
21 make and model of that was?

22 A I don't recall.

23 MR. RION: Nothing further.

1 THE COURT: Okay. Sir, you're excused.
2 Thank you for coming in and sticking around. Make sure you don't have any
3 exhibits.

4 MR. MILLER: Your Honor, may I approach
5 to put these exhibits back on the table?

6 THE COURT: Sure.

7 MRS. KOHLRIESER: Your Honor, real
8 quick, can you check and see whether in the issues we were discussing
9 earlier if the Court's file has exhibit '139' in it? Can I step out for just a minute
10 to make sure that Mr. Kramer doesn't have it?

11 THE COURT: Okay. Who's going to be
12 the next witness for the State?

13 MR. MILLER: I believe it's going to be Mr.
14 Godfrey.

15 THE COURT: Okay. Is that who you're
16 calling?

17 MR. MILLER: Yes.

18 THE COURT: Ched Godfrey?

19 MR. MILLER: Ched Godfrey. Charles
20 Godfrey.

21 WHEREUPON, called to appear as a witness in this proceeding was one:

22 **DETECTIVE CHARLES GODFREY**

23 who, having been duly sworn by the bailiff herein, testified as follows:

1 BAILIFF: He has no objection.

2 THE COURT: Okay. Thank you.

3 **DIRECT EXAMINATION**

4 **BY MRS. KOHLRIESER:**

5 Q All right. Can you state your name for the record, please?

6 A My name is Charles Godfrey.

7 Q Okay. Mr. Godfrey, would you tell us where you're currently
8 employed?

9 A I'm a police officer with the City of Lima, Lima Police Department.

10 Q And what do you do for the Lima Police Department?

11 A I am a supervisor. I'm currently a supervisor in the West Central Ohio
12 Crime Task Force, which is the local Drug Unit.

13 Q Okay. And how long have you been with the Police Department?

14 A Nineteen years.

15 Q Back in September of 2008 through February of 2009 what division
16 were you assigned to?

17 A I was assigned to the detective bureau as a Sergeant, the supervisor.

18 Q Okay. You said a supervisor?

19 A Yes.

20 Q Okay. So, you were in charge of the detectives?

21 A Yes.

22 Q And, if you would, explain to this jury what kind of cases are assigned
23 to detectives in the Lima Police Department's detective bureau.

1 A Felonies that have some kind of solvability. The Lima Police
2 Department has a high call load and there's a lot of felonies that don't get
3 investigated just due to the call load. So, a case that comes that has some
4 kind of solvability, well, then it gets assigned to a detective.

5 Q What would be something that wouldn't get assigned to a detective?

6 A If you have a house that got broken into and they have no idea who did
7 it. A detective would not be assigned to that case. Now, if they process the
8 scene and later on they get a fingerprint where you now have a suspect, well,
9 then it would get assigned. But, initially it would not get assigned.

10 Q Are there times when, say, someone might cut themselves and leave
11 blood and you could go that way?

12 A Yes.

13 Q Okay. All right. Now, when you say felonies, could you in general
14 terms explain for the jury a felony versus a misdemeanor just generally?

15 A You have two Courts. You have a Municipal Court which handles
16 misdemeanors. That's everything punishable less than a year. That's
17 everything from traffic offenses to simple assaults to petty thefts. Then you
18 have stuff that goes to this Court, which is the Common Pleas Court, and that
19 is felonies - you know, murders --

20 Q Let's not talk about punishment.

21 A Okay. Yea. More serious offenses that are felonies.

22 Q Okay. So, detectives get assigned to the more serious offenses?

23 A Correct.

1 Q And during the time -- well, if you would explain, you were a Sergeant
2 for a fairly short period of time in the detective division; correct?

3 A Yes.

4 Q Okay. Could you explain kind of why that was, or how that was?

5 A At the time they were going to rotate supervisors through the detective
6 bureau to give them the experience so when they're in the patrol division they
7 would have an idea of when to call detectives in, and when not to, and what
8 stuff to look for. The plan was to rotate the sergeants to do three months at a
9 time. I ended up staying about eight months.

10 Q Okay. Now, during that time were cases ever assigned to you?

11 A Yes.

12 Q And do you know a person by the name of Markelus Carter?

13 A Yes, I do.

14 Q I believe we have a stipulation, but just for the record, is that the
15 person seated there in the blue shirt and vest?

16 A Yes, that's Markelus Carter.

17 Q Okay. Thank you.

18 MRS. KOHLRIESER: The record will
19 reflect that the witness has identified the defendant.

20 THE COURT: It does.

21 Q Okay. Were you ever assigned a case to investigate where the
22 defendant was the complainant, so to speak, the one wanting to bring the
23 charges?

1 A Yes, I did.

2 Q Okay. Could you explain to the jury how that case was brought to
3 you?

4 A My Lieutenant, my supervisor, came in and gave me some paperwork
5 and asked me if I remembered a standoff in which our tactical team was
6 called out to a house and the guy was inside and refusing to come out. That
7 guy was Markelus Carter. It had worked its way through the Municipal Court
8 and a Temporary Protection Order hearing and so forth in which there was
9 conflicting statements and the charges got dropped and he had made a
10 complaint to someone above me in the chain of command that his then
11 ex-girlfriend and father of his, or, mother of his children had made a false
12 police report and they wanted me to investigate it.

13 Q Was that type of case unusual, filing a false police report? Is that a
14 misdemeanor or felony?

15 A Yes, it's a misdemeanor. In my eight months up there it was the only
16 one that I recall being assigned to any detective, let alone the Sergeant of the
17 detectives.

18 Q So, this wasn't your usual type of assignment?

19 A Correct.

20 Q Did that tell you something about this case?

21 A It came down through the chain of command. So, my impression was
22 that someone somewhere was a squeaky wheel enough for it, or, they had a
23 connect to someone in the police department's administration for them to say,

1 'look, someone needs to look into this'. It ended up falling in my lap.

2 Q Would it be fair to say and, again, I don't want to put words in your
3 mouth, --

4 MR. RION: Objection. Leading.

5 THE COURT: You said you didn't want to
6 put words in his mouth. That's leading. So, sustained.

7 MRS. KOHLRIESER: Okay. All right.
8 Fine.

9 Q When you say squeaky wheel, what do you mean by that?

10 A If someone was to pester them enough, to continually call them, for
11 them to just kind of, you know, 'you've got to look into this so they leave me
12 alone', that kind of thing.

13 Q Okay. In all fairness, is it always just pestering or sometimes there
14 may be something legitimate?

15 A Yes, absolutely. Theoretically they could have looked at it and said
16 'this needs to be something looked at' and it gets handed down as well.

17 Q Okay. Now, did this involve the December 17th, 2007 what I'll call
18 standoff incident?

19 A Yes.

20 Q Were you familiar with that incident?

21 A Yes. At that time I was a member of the Lima Police Department's
22 Tactical Team and we were called out to the defendant's home because he
23 was inside with a weapon and refusing to come out with his children.

1 Q Okay. Do you recall the address?

2 A Yes. 122 East Eureka.

3 Q What was your position that night?

4 A I was a marksman and observer. So, I was off in the distance. I was
5 about, well, in an alley half a block north of there watching the front of the
6 house.

7 Q Okay. Were you in a spot visible to the occupants of the house?

8 A I was hidden in the back seat of a car.

9 Q Okay.

10 A It was very cold. It was like, I don't know, thirty below. It was freezing
11 out that night.

12 Q Okay. Now, let's fast-forward. When this was first brought to you
13 about investigating a false police report were you immediately able to start
14 investigating that?

15 A No. When it first came to my attention was September of '08. That
16 summer had been a very busy summer for the Lima Police Department.
17 There were a lot of people shot and a lot of houses getting shot up. Two rival
18 groups were routinely shooting at each other and it was a couple of times a
19 week we were having these kinds of situations. So, this case, being the
20 complaint of filing a false police report, or making a false statement, was very
21 low on the priority list. I continually pushed it back, and back, and back as we
22 investigated more serious offenses.

23 Q Did the defendant call you about the investigation?

1 A Yea. He would call me routinely - once or twice a week. I think as
2 time went on and I continually told him, you know, "I'm going to try to get to it
3 as soon as I can, but I've got, you know, I've got more pressing things I have
4 to do," you know, it would slow down to like once a week. It got a little bit
5 farther apart. But, he was very persistent in contacting me and wanting
6 something done with that case.

7 Q Okay. Did he express to you what he wanted done?

8 A Yes. He wanted the mother of his children, Sonya, to pay for what she
9 had done and he believed she had made a false police report which then
10 caused him to be arrested and embarrassed.

11 Q Okay. So, do you recall when you were finally able to, in your words,
12 get around to it?

13 A Yes. It was in February of '09. It was February 17th. I was due to
14 rotate out of the detective bureau in March and so I quit taking cases and I
15 started cleaning up the cases I had, completing them and closing them out.
16 On the 17th I had contacted Markelus and asked if I could interview him and
17 his daughter. There was three people awake that night of the standoff. It was
18 him, his daughter, and then the mother of his daughter. He agreed to bring
19 her in. I had the opportunity to interview her. I had the opportunity to
20 interview him. Then the following day, on the 18th, I had the opportunity to
21 interview Sonya.

22 Q Okay. Were you able to get transcripts or recordings or anything as
23 well?

1 A Yes. There was a Civil Protection Order, which is, well, it's just that.
2 It's a civil protection order from the Court that tells someone to stay away
3 from someone else. Someone goes in and says, 'hey, I feel threatened by
4 this person and, you know, I want them to stay away from me', well, the Court
5 then orders a civil order that they need to limit their contact or not to have
6 contact with them and not to get near them.

7 Q Okay. When we say transcripts, are you talking about the hearing the
8 Court would have had to make that decision?

9 A Yes. Just as we're testifying now, later on down the road they will
10 transcribe everything that is said.

11 Q And you got that?

12 A I got that and I got the audio conversation between Detective
13 Neidemire and Markelus Carter the night of the standoff. I reviewed both the
14 testimony there, the police reports, and the audio, or, part of the audio
15 between Detective Neidemire and the defendant.

16 Q You said that you talked to the daughter. Do you recall her name?

17 A Yes. It is - oh, now that you ask me - Tarah. It had escaped me.

18 Q All right. Do you know how Tarah was able to come up and see you?

19 A Yes. The defendant brought her up.

20 Q And you sat down with the defendant and got his version of what
21 happened back in December of '07?

22 A I did.

23 Q Did you ask him about his relationship with Sonya in December of

1 2007?

2 A I did. He had said that they had an on again/off again relationship. I
3 asked if they saw other people. He said that she sees other people and that
4 he's all right with that, but he didn't want her to see a married man. He didn't
5 think his kids should see that, that it wasn't proper for them to see such stuff.

6 Q And during that conversation did you ask him about having weapons?

7 A Yes. I had inquired because the initial report was that he was holding
8 a gun when he struck Sonya. When they went in someone from the S.W.A.T.
9 team had found a BB gun, or a pellet gun, or some kind of toy gun. He had
10 told me at that time that he has paint ball guns, toy guns, but no real guns.
11 He told me that he's not allowed to have them because he had been arrested
12 for Drug Trafficking and he took a plea deal to get it down to Drug Abuse. It
13 was due to that prior felony that he wasn't allowed to have firearms.

14 Q Did he say whether he had firearms at the time you were talking to him
15 then?

16 A He said he did not.

17 Q And then you eventually, or, I guess the next day did you sit down and
18 talk with Sonya Burkholder?

19 A Yea, the following day. I didn't want them to come up at the same time
20 and so I set the appointments on different days. Sonya Burkholder came up
21 the second day. I sat down and interviewed her about the case from '07.

22 Q Did you question her extensively about the version that was against
23 her version?

1 A Yes. I reviewed -- her statement was consistent with what she gave in
2 '07 and was contrary to what the defendant and his daughter had said.

3 Q Okay. Did you, I guess, grill her about those types of issues?

4 A I inquired. At the time it didn't feel right. It felt forced. You know, we
5 interview a lot of people. When I sat down with her I got more of the feeling
6 that she was more of a victim than a suspect. But, I felt obligated because
7 here I am the person investigating her where she's supposed to be a suspect.
8 So, I tried to put pressure on her to see how she would act with her being a
9 suspect. In my opinion she acted, or, what she said came across as truthful
10 and honest and in my heart I didn't think she was lying.

11 MR. RION: Objection.

12 THE COURT: Okay. I'll sustain it. The
13 jury will be instructed to disregard what he said from his heart.

14 A Oh. Sorry.

15 Q That's all right. That was not the intention of my question. After you
16 looked into everything then did you feel you had enough evidence to
17 prosecute Sonya Burkholder?

18 A I did not.

19 Q Okay. So, is that your decision to make?

20 A No. Due to this being a misdemeanor I went down and talked to the
21 misdemeanor prosecutor, who was David Geiger at the time. I explained to
22 him what I had, what the statements were, and what happened that night.
23 We agreed, but it was ultimately his decision, that there was not enough to

1 prosecute her for filing a false police report.

2 Q Okay. So, they decided not to prosecute her for that?

3 A Correct.

4 Q And by they, I mean the Muni. Court prosecutor's office?

5 A Correct. David Geiger.

6 Q All right. Are they the ones responsible for that type of decision?

7 A Yes.

8 Q So, after you spoke to the Municipal Court prosecutor's office -- well,

9 was that on the same day, by the way, that you interviewed Sonya?

10 A Yes.

11 Q And that was February 18th of '09?

12 A Yes.

13 Q Okay. What did you do?

14 A I then called the defendant and advised him that there wasn't anything
15 we were going to be able to do - that there wasn't anything beyond what we
16 had already done to prove his case, or, his belief that she made a false police
17 report.

18 Q Okay. What did he say?

19 A He was upset. You know, he felt that I had let him down, that the
20 system had let him down, and that she was going to get away with it.

21 Q And he expressed that to you?

22 A Yes.

23 Q And that was on what day?

1 A The 18th, February 18th of 2009.

2 Q Thank you. Now, on February 23rd of 2009 were you made aware of a
3 homicide on East McKibben?

4 A Yes.

5 Q At some point were you made aware of any persons that the detectives
6 were, you know, maybe wanting to talk to?

7 A Yes.

8 Q Okay. Who was that?

9 A Markelus Carter, the defendant.

10 Q Do you remember where you were when you heard his name
11 mentioned?

12 A Yea. I showed up to work and I walked up in the detective bureau and
13 it was fairly empty, which was unusual, and they were interviewing people in
14 the interview rooms, which was unusual at that time of morning, and I ran into
15 a couple of the detectives and they told me that there was a homicide and
16 that the victim's live-in girlfriend was Sonya Burkholder. You know, I inquired
17 if there was any suspects. At the time it didn't click. They said, "Well, she
18 suspected her ex live-in boyfriend and father of her children."

19 MR. RION: Objection.

20 MRS. KOHLRIESER: It's not meant for the
21 truth of the matter at all.

22 THE COURT: All right. I'm overruling the
23 objection.

1 MRS. KOHLRIESER: Thank you.

2 A Markelus Carter. Then it clicked with me that this is the case that I just
3 closed out, you know, the week before. I had a number, recent numbers, to
4 get ahold of them. Then I asked the detectives if they wanted me to contact
5 them, or, Markelus, and ask him to come up to the Police Department.

6 Q Okay. And did they?

7 A Yes.

8 Q And did you?

9 A Yes.

10 Q And do you recall what time approximately that call was, the call you
11 made?

12 A Yea. It was at seven fifty-eight A.M., in the morning.

13 Q All right. Did the defendant answer that call?

14 A Yes, he did.

15 Q And what did you tell him?

16 A At first I asked where he was at. He said he was around the corner
17 from his home. I asked him if he could come up to the Police Department so
18 we could talk to him. He asked if there was a break in the case. I believed
19 that he was referring to the filing of the false police report investigation from
20 before. I told him, well, I wanted to be vague and I wanted him to come up,
21 so I asked him, you know, "Well, come on up here and we'll talk about it when
22 you get here." Then we hung up.

23 Q So, at that point you just let that hang out there and you didn't clarify

1 anything?

2 A Correct.

3 Q Okay. Fair enough. Did he come up then?

4 A His house is like five, maybe six blocks away from the Police
5 Department. He told me he was right around the corner. So, I expected him
6 to show up. He's the guy that always calls, you know, and he wants stuff
7 done and so I expected him to come up right away. After a half hour he
8 hadn't showed up.

9 Q So, what did you do?

10 A I called him back and again asked him to come up to the Police
11 Department.

12 Q What, this time, was said between the two of you? Go ahead with the
13 whole conversation.

14 A Well, I inquired, or, I asked him, you know, "Hey, can you come up
15 here? We need to talk to you." He asked what it was about. I told him that
16 something happened to Kenneth and that we needed to talk to him and make
17 sure that he wasn't involved. He told me, "I don't like the sound of that." I
18 was like, you know, "Just come up here so we can talk to you and we can,
19 you know, make sure you're not a suspect and make sure you're not
20 involved."

21 Q Okay. What did he say then?

22 A He said that he had to drop off some proofs. I think he said on West
23 High Street. Then he said that he would be up in an hour and we hung up.

1 Q At that point did he express any concerns about any family members?

2 A No.

3 Q What time did you say that call was?

4 A At seven fifty-eight, just before eight o'clock in the morning.

5 Q No, the second call.

6 A Oh, the second call was at eight thirty-two.

7 Q And do you know whether he came in promptly after that call?

8 A No, he did not.

9 Q Do you know whether he came up to the station eventually?

10 A Yes, he did.

11 Q Do you know how he got there?

12 A Yes. After the second phone call I researched what kind of vehicle he
13 had and his information and I relayed that to officers so that they could try to
14 locate him. That was relayed to them and they ended up coming across him
15 and then they brought him up to the Police Department.

16 Q Okay. Was he interviewed at that time?

17 A Yes.

18 Q And who interviewed him?

19 A Detective Kleman and myself.

20 Q And are you aware of whether that was recorded?

21 A Yes.

22 Q Now, during this first interview, I'm talking the first interview, did the
23 defendant tell you that he had a weapon in his home?

1 A Yes.

2 Q Was that contrary to what he had told you the week before?

3 A Yes.

4 Q Did you confront him about that?

5 A Yes.

6 Q After the interview ended did you do anything to ascertain for yourself
7 whether the defendant was permitted to have a firearm?

8 A Yes. After the interview I called the Clerk of Courts at the Common
9 Pleas in Allen County and gave them the defendant's information and asked
10 them if he had been convicted of any offenses. They advised me that he was
11 convicted of Drug Abuse, felony Drug Abuse. Therefore, that would put him
12 under a disability by the Ohio law.

13 Q Okay. By disability what do you mean?

14 A When someone is convicted of an offense of violence or a felony drug
15 offense they are no longer allowed to possess or handle firearms.

16 Q So, once he's telling you that he has a firearm in his house, you've
17 seen that he has a conviction for a felony Drug Abuse offense, what
18 happens?

19 A Officers were outside his house securing it and making sure no one
20 went in and out. An officer was in the process of typing up a search warrant
21 for the house so we could go in and look for the gun. I called the Allen
22 County Prosecutor and briefed him on the situation and asked if he would
23 authorize a charge of Having Weapons Under Disability on the defendant.

1 Q Okay. And by prosecutor are you referring to myself or Mr. Miller?

2 A No. It was Prosecutor Juergen Waldick, the actual prosecutor.

3 Q The actual elected official?

4 A Correct.

5 Q All right. Now, you said a search warrant was being obtained.

6 Generally speaking, to your knowledge, again, assuming all the normal
7 circumstances, are officers just allowed to go into someone's home and start
8 looking?

9 A No.

10 Q You've got to have a search warrant for that?

11 A Correct.

12 Q Now, was a search obtained?

13 A There was.

14 Q And do you recall as to that search warrant, the scope of it? By scope
15 I mean what you were allowed to search for?

16 A We were looking for weapons because that is what he had told us he
17 had in there and that's what the focus of that search warrant was. So, we're
18 only allowed to look for what's stated in the search warrant. So, the focus
19 was weapons/firearms.

20 Q Okay. Thank you. Did you, in fact, find weapons?

21 A Yes. We found a .357 as he had described in the interview.

22 Q And was another weapon found?

23 A Yes.

1 Q That weapon -- well, were you present when the .357 was found, the
2 weapon that he had acknowledged having?

3 A I was in the house. I didn't find it. I don't recall going over and looking
4 at it. I just remember the other officers telling me about it.

5 Q Okay. And when you say other officers, do you, to your recollection,
6 recall who all was there?

7 A Detective Clark, Detective Leland who was the affiant on the search
8 warrant, myself, Patrolman --

9 Q I'm sorry. Let me stop you right there. You said Detective Leland was
10 the what?

11 A The affiant. He's the one that typed out the search warrant.

12 Q Okay.

13 A By my recollection, at least.

14 Q All right. When you say affiant are you referring to the person who
15 swears that the contents are correct?

16 A Yes.

17 Q Okay. All right. So, he's the one that got the search warrant?

18 A Correct.

19 Q All right. Sorry. After Detective Leland, please carry on.

20 A Oh, we were there. When we first went in the house we would have
21 checked it to make sure nobody was in there and then we would have started
22 looking around.

23 Q When you say you would have checked to make sure nobody was in

1 there, how do you go about that and why?

2 A No one had been in the house. As far as we knew the kids could have
3 been home, or a family friend. Anybody could have been there. So, when we
4 go in we're going to be searching and so initially you go through the entire
5 house to make sure nobody is in there. You don't want to be searching and
6 have someone walk out and surprise you. This is a murder investigation, or,
7 connected to a murder investigation and you don't want to be hurt. It's for
8 safety reasons.

9 Q Okay. So, is that called a protective sweep?

10 A Yes.

11 Q Okay. Were you there for the protective sweep?

12 A Yes.

13 Q Okay. How do officers, and particularly the ones on this particular
14 incident, go about conducting a protective sweep?

15 A You break down and stay in pairs and go through room to room,
16 systematically going through the house to make sure no one is there. You
17 don't want to leave a room unsearched. Again, you're searching for people at
18 this point. You don't want to bypass anyone.

19 Q When you say you're searching for people are you looking in places
20 where a body can be?

21 A Yes.

22 Q So, you're not necessarily opening a kitchen utensil drawer?

23 A Correct.

1 Q You might open a closet, though?

2 A Correct.

3 Q Okay. I just wanted to make sure we were clear on that. Okay. Let's
4 just put it out there - are weapons drawn when you're going through the
5 house looking for persons?

6 A Yes.

7 Q Could you show me in your case and in your general experience in
8 these matters how an officer holds their weapon when they're going room to
9 room to search?

10 A Normally they would hold it --

11 Q Please stand up and show us.

12 A They would hold it down in front of them, that way if they was to come
13 into contact with someone it would be accessible to them. You want it
14 accessible. You don't, you know, you're not going to walk through like you
15 see on T.V. where it's out here the whole time. You want it down.

16 Q You want it by your midsection? Is there where, for the record, you're
17 pointing?

18 A Yea. Some people keep it down. Different people have different
19 styles. But, you want it pointed in a safe direction so the muzzle is not going
20 to go in front of anyone and so forth. But, you go through and you open up
21 closets and look under beds. Again, you're looking for people.

22 Q Okay. So, you would be holding your weapon in one hand. Whether
23 your arm is extended and the weapon would be, I guess, more at the start

1 of your legs type of thing, depending on how long your arms are, or up by
2 your midsection and you would use your other hand to open doors and things
3 like that?

4 A Correct.

5 Q Okay. Were any weapons fired during that protective sweep?

6 A No. No.

7 Q And during that search did you actually find a weapon?

8 A Yes.

9 Q Do you recall what kind and caliber that weapon was?

10 A No. I only saw the portion of the grip.

11 Q Okay. All right. I'm going to show you some pictures here, if I can get
12 to them.

13 MRS. KOHLRIESER: For the record, your
14 Honor, I'm also showing Mr. Rion State's exhibit '117-B', '117-C', '118', and
15 '121'. I'm now showing them to the witness.

16 Q Look at those four pictures and tell me when you're done.

17 A Okay. I'm done.

18 Q I'm going to put them on the projector one at a time. I'm giving you this
19 laser pointer.

20 THE COURT: You've got to twist it.

21 MRS. KOHLRIESER: Twist it?

22 THE COURT: I don't know.

23 MRS. KOHLRIESER: Here. You try it.

1 Q All right. State's exhibit '117-B'. What are we looking at here, if you
2 recall?

3 A This is the closet in the master bedroom. It was on the second floor,
4 the north bedroom. Can I stand up and just point?

5 THE COURT: Yes.

6 MRS. KOHLRIESER: Yes. We have one
7 of these, too.

8 THE COURT: Let me have that laser.
9 Maybe it needs a battery.

10 MRS. KOHLRIESER: Here you go.

11 Q This is a wooden box. It's a little blurry. But, you've got a shelf up
12 there. It's on there. It's in the master bedroom. I had walked up and I had
13 lifted up the lid. When I lifted up the lid I could see the butt of a pistol. I'm
14 somewhat familiar with pistols. I'm not an expert or anything. But, it looked
15 like the butt of a Glock to me.

16 Q Okay. When you say the butt, do you mean where you would hold it?

17 A Yea. If you grab a pistol it would be the bottom, the part that would be
18 nearest to your pinkie.

19 Q Okay. And does '117-B' fairly and accurately represent what you saw
20 in that closet that day?

21 A Yes.

22 Q So, upon seeing that what did you do?

23 A Once I saw it I left it alone. I went back downstairs. At that time

1 Detective Clark and Detective Leland was there. Our identification officer
2 wasn't there then. I told them that it was there. I left it be.

3 Q Okay. So, looking at '117-C', could you show the jury where you would
4 have touched that box?

5 A It was on the corner. It would have been on this corner. I lifted it up
6 and I would have saw it inside, noted it, and shut it, and then just left it be.

7 Q Okay. So, for the record, when you say this corner, if you're looking at
8 the picture, on the right hand side there, the front?

9 A Yes. I'm right handed, though. I would have reached up with my right
10 hand.

11 Q Okay. So, now State's exhibit '118'. Is that what that box looked like
12 when you opened it?

13 A Yea. Now, I couldn't see into it. I'm not the tallest person and so I did
14 have it down to an angle. I could see the portion, the top portion, of the grip
15 and I could see inside here where on a Glock there's a little gap on the grip, a
16 hollow gap - where the magazine goes in there's a hollow gap. That's what I
17 could see. I couldn't see any of this. I could only see this portion. I shut it
18 and left it be.

19 Q For the record, the portion you were just pointing to, are we talking
20 about the black item in the middle of the picture there?

21 A Yea. If you were to hold it in your hand it would be the portion that
22 would touch -- it would be the very back of the weapon at the bottom of the
23 grip.

1 Q Okay. That's what you saw?

2 A Yes.

3 Q And you were able to say that's a weapon?

4 A Yes.

5 Q Or, at least look at this, I'm pretty sure that's one?

6 A Yes. It was some kind of pistol. It could have been a toy pistol at that
7 point. I couldn't have told you.

8 Q So, you made that known and that's all you did with that?

9 A Yes.

10 Q Would that have been the -- well, you didn't actually touch the weapon;
11 correct?

12 A Correct. I never touched -- I never touched that pistol.

13 Q Now, you say that you left that?

14 A Correct.

15 Q Did you, yourself, observe any camouflage in that room that you can
16 remember?

17 A No.

18 Q And at that time your focus was looking for what?

19 A Weapons, guns, firearms.

20 Q Now, when you say you left, left out of that room, or left the house, or
21 what do you mean?

22 A While we were there initially, after we went in and we did the protective
23 sweep of the house and we were waiting for the identification officer to come

1 Detective Clark, and we had already found the .357 that Mr. Carter had told
2 us about and we already got permission from Prosecutor Waldick to arrest
3 him for Weapons Under Disability, Detective Clark saw the defendant in a car
4 parked in the block, that he had arrived and he had told us, "Hey, you know,
5 Markelus is back. You know, do we want to go arrest him?" We decided we
6 should and a couple of uniformed officers and I believe Detective Clark went
7 out and talked to him and arrested him.

8 Q Okay. Do you know when he was arrested was he transported to jail?

9 A Yea. He would have been taken up to the Police Department and/or to
10 the jail. His vehicle was on one side of the house, on the street, and the
11 police cruiser where they were walking him to was on the other side. I was on
12 the sidewalk in front of the house. As they walked him past he asked if we
13 were going to talk. I told him, yea, that I would come up and talk to him.
14 They, then, put him in the police car and they would have took him up to the
15 Police Department.

16 Q So, he asked you, "Hey, are we going to talk?"

17 A Yes. He called me by name and asked if we were going to talk.

18 MRS. KOHLRIESER: Your Honor, could
19 we approach just a moment?

20 THE COURT: Sure.

21 (WHEREUPON, Court and counsel had a brief discussion at the Bench, on
22 the record, as follows.)

23 MRS. KOHLRIESER: (Inaudible).

1 COURT REPORTER: Terri, I can't hear you.

2 MRS. KOHLRIESER: We're getting ready
3 to play the video. It's approximately thirty minutes long. I don't know if you
4 want to take a break. I also have follow-up questions for him. I didn't know if
5 you wanted to take a lunch break now.

6 MR. RION: I'd like to make a record,
7 anyway, about --

8 THE COURT: All right. We'll do that. All
9 right. We'll take a break.

10 (WHEREUPON, Court continued on the record, as follows.)

11 THE COURT: Ladies and gentlemen of
12 the jury, they've indicated they think the witness will take a little bit longer and
13 it may impinge upon our scheduled lunch hour and so we'll recess for lunch.

14 Remember the admonitions that I have given you all along. Don't
15 discuss the case among yourselves or with anyone else. Don't have any
16 contact with anybody involved in the case. Don't post anything on the
17 Internet or social media. Don't pay attention to media accounts. Don't
18 formulate or express opinions.

19 You'll be excused. It's a quarter till twelve. Let's go until one o'clock
20 and then we'll get back and we'll try to get started. Okay? I want counsel to
21 stick around for a minute or two.

22 (WHEREUPON, JURY WAS EXCUSED FOR LUNCH BREAK.)

23 THE COURT: The record will show the

1 jurors have left the Courtroom. Now, the State had indicated that they
2 intended to play a DVD recording of apparently the statement that Mr.
3 Godfrey just spoke of. Is that correct?

4 MR. MILLER: Yes, your Honor.

5 MRS. KOHLRIESER: Yes. I'm sorry.

6 THE COURT: And then, Mr. Rion, at the
7 Bench you had indicated you wanted to be heard with regard to that.

8 MR. RION: Yes. As it relates to the video,
9 well, I don't know if the Court has seen this or not. But, essentially it is, well,
10 they put Mr. Carter in a room by himself. While he's in the room by himself he
11 has his head on the table and he's sort of moving his head in an odd manner
12 and making some statements, such as 'why am I here', and things like that.
13 I'm just concerned that there's really no probative value to it. I see it, and I've
14 shown it to other people, and it will strike people as odd. It could easily lead
15 someone to believe the wrong -- come to conclusions that aren't necessarily
16 backed by anything other than a bias. I guess my point is is that there's some
17 prejudicial effect to it and I don't see the probative value. I don't mind if
18 there's any statements that he made that those be listened to. When the
19 officers come in the room and they're talking to him, you know, I suppose
20 that's something. But, while he's in there by himself I just don't really see the
21 probative value of it. Given the medical history that Mr. Carter has, and the
22 Court is aware of through prior Motions filed, I just think that it's prejudicial.
23 So, I would ask that the Court just modify the tape that way.

1 THE COURT: All right. Well, to answer
2 one of your questions, I haven't seen it actually yet. I don't know what the
3 exhibit is. I have seen DVD's of statements in prior hearings in perhaps other
4 cases. I don't know if this is the same. It sounds familiar. But, does the
5 State want to be heard?

6 MRS. KOHLRIESER: Yes, just briefly,
7 your Honor. It goes to the whole general dynamic of the attempted interview
8 and things of that nature and the defendant's reaction in the moments
9 following his arrest. It just goes to the overall presentation that he has
10 throughout this.

11 THE COURT: Is there included in there
12 not only this time when he's alone, but also time when Mr. Godfrey comes in
13 and questions him? Correct?

14 MRS. KOHLRIESER: Yes, absolutely,
15 your Honor. I will say for the record, however, and I told Mr. Rion this, by the
16 L.P.D. clock, not the computer clock, but by the L.P.D. clock at fourteen
17 thirty-eight and and zero seconds I cut it off because at that point Sergeant
18 Godfrey goes, "Look," basically, "final answer, do you want an attorney or
19 not," and he invokes his right to an attorney. So, I cut that out.

20 THE COURT: So, everything after that
21 point is not included?

22 MRS. KOHLRIESER: Yes. Absolutely.

23 THE COURT: But, there's some portion

1 before Godfrey questions him that the defendant is viewed in the interview
2 room by himself?

3 MRS. KOHLRIESER: Yes. And, again, it
4 goes to his demeanor and what all is going on with him at that time.

5 THE COURT: Again, I don't know if it's the
6 same one I may have seen before in a prior hearing, --

7 MRS. KOHLRIESER: I believe you have.

8 THE COURT: -- but are statements made
9 while the defendant is alone?

10 MRS. KOHLRIESER: I think really the
11 statements he makes are 'I don't know why I'm here, I don't know why I'm
12 here, I don't know why I'm here', which actually plays right into what just
13 happened, the one that we showed, well, not just in this trial, but in real life
14 what had just happened with Investigator Kleman. Again, it's just his general
15 make-up and it helps explain some of the discussion that happens when the
16 detectives walk in the room.

17 THE COURT: All right. Again, with the
18 representation that this is the same one that I had seen in a previous hearing
19 in one of the other cases in a Motion to Suppress I'll overrule the objection
20 and allow it to be played. Exceptions will be noted. Okay?

21 MR. RION: Then, as a separate Motion, I
22 would, at this point, motion the Court to exclude the testimony of Mr. Kramer
23 as it relates to a Mac-10 for two reasons. Number one, he testified that he,

1 himself, did not do the procedure and was relying upon information from
2 others, which I don't think was made clear during direct. Secondly, that if he
3 were requested to do this now, well, his testimony was that the policy at B.C.I.
4 is not to do it. So, had -- well, my sense is that the reason why he didn't
5 perform this testing is because B.C.I. has a policy against doing this test. He
6 may have even been asked to do it and didn't do it because his own
7 department wouldn't allow it for reliability purposes. So, to bootstrap an old
8 report with results that we can't verify and then all the testimony that came
9 after that it just seems as if it should be excluded as evidence. So, I would
10 ask that it be ordered excluded.

11 THE COURT: Any response?

12 MRS. KOHLRIESER: As to the first prong,
13 again, he testified what it was, how it was, how it came about, and that type of
14 thing and his reliance thereon and no reason to doubt her findings again. We
15 certainly can make arrangements to have Miss Williams herself come in if
16 necessary.

17 THE COURT: Let me ask - maybe I wrote
18 it down wrong. Was not Wharton's and Davison's report stipulated to?

19 MR. MILLER: Wharton's, I believe, --

20 MRS. KOHLRIESER: Davison's was
21 stipulated to. That's G.S.R. Wharton's -- the stipulation was regarding that
22 he test-fired two of the bullets from State's exhibit '129'. There were seven
23 when he got them and there were five after he test-fired those two.

1 THE COURT: Other than the hearing on
2 the Motion for a Mistrial we haven't seen Williams' report?

3 MRS. KOHLRIESER: No.

4 THE COURT: Nobody identified that?
5 Okay. So, Davison's report was stipulated to, but Wharton's report was not;
6 correct?

7 MRS. KOHLRIESER: Yes. As for the
8 second prong that Mr. Rion brought up, he said we don't report it out. It's not
9 part of their routine in doing this anymore. B.C.I. has said this is not, because
10 it's not updated, they're not going to do it. We're talking about testing things
11 in 2015 and it hasn't been updated since 2010 and so we're just not going to
12 do that until they update it and we'll revamp our policies as needed. But, he
13 specifically said, when I asked him, if I were to call you up and say, 'hey, can
14 you do this for me', then he could do it. B.C.I. doesn't say you absolutely
15 cannot do it under any circumstances - but, just as a matter of course you're
16 not going to unless it's requested.

17 THE COURT: I'm going to overrule the
18 request, the Motion to Exclude Mr. Kramer's testimony. I believe the issues
19 raised would go to his credibility and credibility of his testimony and not to the
20 admissibility. Therefore, I'm not going to exclude it.

21 Anything else?

22 MRS. KOHLRIESER: Not from the State,
23 your Honor.

1 THE COURT: Okay. See you at one.

2 (WHEREUPON, COURT WAS IN RECESS FOR LUNCH BREAK.)

3

4 THE COURT: Okay. We're reconvening
5 this 16th of September, 2015 in Case Number CR2014 0139, State of Ohio
6 -vs- Markelus Q. Carter. The defendant is present with counsel. The State is
7 present. The jurors have returned from the noon recess.

8 After you folks went to lunch, ladies and gentlemen of the jury, the
9 Court dealt with some matters and those are on the record. So, now we'll
10 continue with the direct examination of Officer Godfrey. Mrs. Kohlriseser, you
11 may continue.

12 **DIRECT EXAMINATION OF SGT. CHARLES GODFREY CONTINUED**

13 **BY MRS. KOHLRIESER:**

14 Q Okay. I may repeat a couple of questions just because I'm not sure
15 where I left off entirely. The defendant had asked you at the East Eureka
16 Street home about whether you were going to talk some more?

17 A Correct.

18 Q Okay. And then he was taken to the station?

19 A Yes, he was taken to the Lima Police Department.

20 Q Okay. And did you talk to the defendant a second time?

21 A Yea. I went up to the Police Department. Since I had already got
22 authorization for an arrest warrant for him we hadn't had time to actually
23 obtain the paperwork and so I walked to the Municipal Court and served it on

1 him and then escorted him upstairs to an interview room and conducted an
2 interview with him.

3 Q I'm going to hand you what has been previously marked State's exhibit
4 '140'.

5 MRS. KOHLRIESER: For the record, your
6 Honor, I've shown Mr. Rion and now I'm showing that to Investigator - excuse
7 me - Sergeant Godfrey.

8 Q Sergeant, do you recognize what State's exhibit '140' is?

9 A Yes.

10 Q What is it?

11 A It's a DVD of the second interview with the defendant, Markelus Carter,
12 that myself and Lieutenant Baker conducted.

13 Q And was it on February 23rd, 2009?

14 A Yes.

15 Q Have you had the opportunity to review that exhibit?

16 A Yes.

17 Q Okay. And it is, in fact, an edited version?

18 A Yes. It's not the complete, but what I watched is true and accurate of
19 what happened that day.

20 Q Okay. And the edits weren't relevant to this particular case; correct?

21 A Correct.

22 MRS. KOHLRIESER: Your Honor, at this
23 time, for the record, I would like to play State's exhibit '140'.

1 THE COURT: Okay. I'll let you play it,
2 noting for the record the discussion we had right when the jurors were
3 excused for lunch.

4 (WHEREUPON, State's exhibit '140' was played in open Court.)

5 THE COURT: Stop. Stop the record.

6 MRS. KOHLRIESER: I believe she's
7 getting ill, your Honor.

8 THE COURT: I want the record to show
9 that a juror jumped up and left the room. My bailiff will check on the juror.

10 MRS. KOHLRIESER: I believe, for the
11 record, that's she also the one that had the illness last week, your Honor.

12 THE COURT: Yea. For the record, it's
13 number three.

14 (WHEREUPON, Court went off the record briefly.)

15 (WHEREUPON, juror returned to the Courtroom.)

16 JUROR NUMBER THREE: I apologize.

17 THE COURT: No need to apologize.
18 We're back on the record. Okay. So, let the record reflect the juror is back in
19 the Courtroom. Again, Mrs. Krites; right?

20 JUROR NUMBER THREE: Yes.

21 THE COURT: I don't want to embarrass
22 you any more. We can talk to you privately if you would rather. But, are you
23 okay?

1 JUROR NUMBER THREE: I'm fine.

2 THE COURT: Okay.

3 JUROR NUMBER THREE: It's just -- well, I don't know whether lunch didn't
4 like me or what.

5 THE COURT: Okay.

6 JUROR NUMBER THREE: It was like it was coming up and I had to run. I'm
7 sorry.

8 THE COURT: Okay. Well, it's not the
9 same kind of thing that you had earlier in the trial?

10 JUROR NUMBER THREE: No. This was lunch.

11 THE COURT: Do you feel like you can
12 continue?

13 JUROR NUMBER THREE: I'm fine. I'm embarrassed; but I'm fine.

14 THE COURT: Well, don't be embarrassed.
15 You haven't been ill during the evenings or anything; have you?

16 JUROR NUMBER THREE: Pardon me?

17 THE COURT: You haven't been ill --

18 JUROR NUMBER THREE: No. I ate lunch and walked back across the
19 street with the rest of them and I could just feel it. It's like it was right there.

20 THE COURT: Okay. So, you feel it's not
21 going to interfere with your ability to continue?

22 JUROR NUMBER THREE: Oh, no. I'm fine. Thank you.

23 THE COURT: Okay. All right. Do you

1 want a cup of water?

2 JUROR NUMBER THREE: No.

3 THE COURT: You're good?

4 JUROR NUMBER THREE: She gave me some mints. I'm fine.

5 THE COURT: Okay. All right. With that,
6 we'll continue. We're still on the record. You may continue with the DVD.

7 MRS. KOHLRIESER: Your Honor?

8 THE COURT: Yes?

9 MRS. KOHLRIESER: Your Honor, would
10 you inquire of Miss Krites - I mean, does she want us to back it up like a
11 minute or so. I don't know if she was distracted.

12 JUROR NUMBER THREE: That would be great. Thank you.

13 THE COURT: All right.

14 MR. MILLER: I'll try to do that. Okay.

15 Ready, your Honor?

16 THE COURT: Go ahead.

17 (WHEREUPON, State's exhibit '140' continued to be played in open Court.)

18 MRS. KOHLRIESER: Okay. You can go
19 ahead and put the lights back on, Sue.

20 Q Let me ask you a couple of questions about that. Again, I don't know
21 why that cut off where it did. I apologize. There we can see in that small
22 portion of the video -- it goes on for approximately ten more minutes?

23 A The total is about twenty-five minutes/thirty minutes total.

1 Q The whole thing from beginning to end?

2 A The whole thing from beginning to end.

3 Q All right. So, at the beginning there when we see, well, who is the
4 other person in the room besides you and the defendant?

5 A Lieutenant Baker, my boss at the time, and still my boss.

6 Q Okay. The defendant expressed to you he wasn't feeling well?

7 A Correct.

8 Q Now, did you notice things, I guess, throughout this time about his
9 appearance and demeanor, including what we didn't see?

10 A Yes.

11 Q What was that?

12 A To me, it wasn't genuine.

13 MR. RION: Your Honor, I'm going to
14 object. The jury can view it.

15 MRS. KOHLRIESER: I'm talking about the
16 portions -- between that and the portions that we did not see, your Honor. I
17 apologize, but I think what happened when I gave it to our editing person is I
18 said to cut it off at fourteen thirty-eight and I think he did fourteen minutes and
19 thirty-eight into it rather than --

20 THE COURT: I'll overrule the objection to
21 the extent that the witness can testify to what he was about to say, but give a
22 basis as to why he has that.

23 MRS. KOHLRIESER: Sure. Absolutely.

1 Okay.

2 THE COURT: It will be up to the jury to
3 decide whether they believe that or not.

4 MRS. KOHLRIESER: Okay. Thank you.
5 Sorry about that.

6 Q I forgot what my question was. Did he display certain behaviors
7 throughout this on what we saw and, more importantly, on what we didn't
8 see?

9 A I believe there were times that he appeared to have trouble
10 communicating with us and other times he appeared to be able to
11 communicate with us much better.

12 Q Okay. And what do you mean by that?

13 A Whenever we would try to talk to him about his condition or this case
14 you could barely understand him. I would have to ask him to repeat stuff two
15 or three times. If I inquired about his son or family stuff he was able to perk
16 up a little bit and respond more coherently.

17 Q Okay. Was he able to answer all of your questions?

18 A Yes.

19 Q And I think we saw on the video where you offered him a glass of
20 water. Do you recall what his -- well, could you make out what his response
21 was? I don't know how clear it was on the video.

22 A Yea. I asked him -- I believe I asked him a total of two times what he
23 said and he said that he didn't want it because he thought he would choke

1 on it.

2 Q Okay. Each time he gave you the same response?

3 A The first couple of times I couldn't make it out. They were mumbled.

4 But, the last time I made out what he said.

5 Q Okay. All right. Now, in your line of work -- well, at this point he's in
6 custody; correct?

7 A Correct. At that point he had been arrested for Having Weapons
8 Under Disability.

9 Q And how was that different from the first time you spoke to him?

10 A The first time we spoke to him he wasn't in custody. He was free to
11 leave anytime he wanted. He could come and go. He could answer his
12 phone. He was there voluntarily. This time he was in custody. He wasn't
13 free to leave. He couldn't use the phone unless we gave it to him for him to
14 use it.

15 Q Okay. At the very end there of that video and, again, I apologize, I
16 don't know what happened there, but at the end of that video you leaned back
17 and you were trying to get him to hold his head up. What were you getting
18 ready to do - the part we don't see on the video, but it's actually there
19 somewhere? It's actually recorded, but we didn't have it there. What were
20 you getting ready to do as you told him to get his head up. What were you
21 attempting to do, I should say?

22 A I wanted him to sit up and be coherent and engage us in conversation.

23 Q Before you engage him in conversation what are you required to do

1 since he's in custody?

2 A Oh, we would have advised him of his Miranda Rights.

3 Q Okay. Did you, in fact, attempt to do that?

4 A Yes.

5 Q Was he able to acknowledge he was understanding those answers, or
6 questions, I mean, or rights?

7 A No. Whenever someone is in custody, before we question them about
8 a crime, we have to advise them of their Miranda Rights. It's our job to make
9 sure they understand those. We went over them and he would mumble and,
10 you know, it wasn't clear that he understood it. So, we just repeatedly went
11 over them and over them in hopes of him giving a reaction that 'yes, I
12 understand them'. But, throughout that he was twitching and rolling around
13 and, in my opinion, appeared to be prolonging it.

14 MR. RION: Objection.

15 THE COURT: Overruled.

16 MRS. KOHLRIESER: Just a moment, your
17 Honor. I think I have a solution.

18 (WHEREUPON, Court went off the record briefly.)

19 Q I'm going to hand you what's been previously marked as State's exhibit
20 '140-A' and ask you to take a look at that.

21 A This is a DVD of the interview with myself, Lieutenant Baker, and the
22 defendant.

23 Q And that's the full interview?

1 A Yea, this is my handwriting. This would have been the original.

2 Q Okay. Without the edits and things of that nature?

3 A Correct.

4 Q Okay. Thank you.

5 MRS. KOHLRIESER: Your Honor, at this
6 time, I would like to play this from where we left off on that one and I'll stop it
7 at the appropriate time where it should have been edited.

8 THE COURT: Okay. Just so the record
9 shows, like on the counter, where you're starting and, on the counter, where
10 you're stopping.

11 MRS. KOHLRIESER: Yes, your Honor. If
12 I could have just a moment?

13 THE COURT: Okay.
14 (WHEREUPON, Court went off the record briefly.)

15 MRS. KOHLRIESER: Your Honor, for the
16 record, the total video begins at fourteen fourteen oh two by looking at
17 L.P.D.'s counter there at the top. I'm going to fast-forward it just a moment.
18 Your Honor, this may copy over a little bit but, for the record, I'm going to play
19 '140-A' starting at fourteen twenty-five thirty-five.

20 (WHEREUPON, portion of State's exhibit '140-A' played in open Court.)

21 COURT REPORTER: Terri, just a second.

22 THE COURT: Just a second. We want to
23 get it on the record.

1 MRS. KOHLRIESER: Oh, I'm sorry.

2 COURT REPORTER: Okay.

3 MRS. KOHLRIESER: For the record, we
4 stopped it at fourteen thirty-eight.

5 THE COURT: Okay.

6 Q All right. This interview that we just saw, '140-A', or, I guess, '140' and
7 '140-A' in connection, the entire contents of '140', the first DVD I attempted to
8 play, are those also contained on '140-A'?

9 A Yes, they are.

10 Q Okay. Thank you. We see a time up there. Could you tell us in
11 non-military time what time of day you were talking to him?

12 A It was two thirty-eight.

13 Q Two thirty-eight in the afternoon --

14 A P.M. Yea, the afternoon.

15 Q -- would be when this concluded?

16 A Yes.

17 Q So, was this after the interview where he told you about the .357?

18 A Yes.

19 Q And was this after the interview over the December 17th issue, or, the
20 interview earlier that day where he had told you he was under disability?

21 A Yes.

22 Q And by that I mean not allowed to have guns.

23 A Correct.

1 Q Okay. Thank you. Now, during this time there are points when his
2 voice shifts and things like that; would you agree or disagree?

3 A Yes.

4 Q Okay. Did you ever notice any tears of any sort?

5 A Say that again.

6 Q Did you ever notice any tears of any sort?

7 A No.

8 Q The form that you placed in front of him, what is that?

9 A It is the Lima Police Department's, well, it's called an admonishment
10 form. It explains his Miranda Rights and then the second paragraph is the
11 waiver portion stating he understands those and he would be willing to speak
12 with us.

13 Q Okay. And I believe it's Sergeant Baker - excuse me - at the time
14 Lieutenant Baker and now Major Baker; correct?

15 A Yes.

16 Q Okay. That says to him a few times about 'there's questions we have
17 for you'.

18 A Yes.

19 Q Why, if you know, would Investigator Baker be telling him that? Why
20 would you not just be talking to him about what you're there for?

21 MR. RION: Objection. Objection as to
22 what Officer Baker is thinking when he's asking questions.

23 MRS. KOHLRIESER: I said 'if you know'.

1 THE COURT: I'm going to overrule the
2 objection and allow him answer.

3 Q Why do you believe he was asking that, based upon your experience?

4 A We're not allowed, -- when someone's in custody we're not allowed to
5 ask them about the crime that they're in custody for without first making sure
6 they understand their Miranda Rights that we had just read to him.

7 Q Okay. And is it simply -- you know, you see on T.V. that you say these
8 rights. Is that sufficient?

9 A No. The purpose is that they understand it.

10 Q Okay. Are you required to make some kind of decision as to whether
11 you think they're understanding?

12 A Correct.

13 Q Is that why you're asking him some of those questions that we see?

14 A Yes. At that point and time I wanted to make sure he understood it.
15 He did tell us, 'yes, I understand it', but at the time I was unsure and so I
16 wanted to verify it.

17 Q Okay. There's a point I think where you ask him about understanding
18 that and he looks down. Did it appear to you as if he was reading that form,
19 or simply putting his head down?

20 A I do not recall if he was reading it or putting his head down.

21 Q Okay. Did you notice any physical signs of illness in him - any, I don't
22 know, sweating or anything like that?

23 A No.

1 Q Okay. Let me ask you - have there been times when you have
2 someone in an interview room and they do show visible signs of illness?

3 A Yes. If we believe that they're having a medical emergency we would
4 call the Fire Department and have paramedics respond.

5 Q Okay. Was there anything in your interactions with the defendant
6 throughout that day, and particularly in this interview here, that caused you to
7 feel that you should call medical personnel?

8 A No.

9 Q And besides what we've seen on the video, was there any point that he
10 had anything further to add besides repeating his earlier statements about
11 protecting his family and that?

12 A Not that I recall.

13 MRS. KOHLRIESER: Just a moment.

14 THE COURT: Okay.

15 (WHEREUPON, Court went off the record briefly.)

16 Q Let me ask you a couple of questions. Let me back you up. I don't
17 know what it is in relation to this. Was there a time on the 23rd that you went
18 back out to the scene, well, not back out, I should say, but did you ever go to
19 436 East McKibben?

20 A Yes.

21 Q Okay. And was that after what we just saw on State's exhibit '140-A'?

22 A Yes.

23 Q And what was the purpose of going out to 436 East McKibben?

1 A Canvass the neighborhood to look for witnesses.

2 Q What does that mean - canvass the neighborhood?

3 A Going door to door trying to find anyone that heard something or saw
4 something that may know anything about it.

5 Q Okay. Were you specifically knocking on doors in the four hundred
6 block of East Pearl?

7 A Yes.

8 Q Without going into detail about what anybody said, were there some
9 people that were home?

10 A Yes.

11 Q Were there some people that weren't home?

12 A Correct.

13 Q Okay. Were you able to actually talk to people?

14 A Yea. I talked to, I would guess, a half a dozen people. Several of
15 them heard the gunshots. Several of them didn't. One, after hearing the
16 gunshots --

17 MR. RION: I'm going to object to the
18 substance of what they said. I think the jury's already heard it.

19 MRS. KOHLRIESER: I can stop him there
20 and ask him another question, your Honor.

21 THE COURT: Okay.

22 Q Did you go to 448 Pearl Street that day?

23 A I did.

1 Q Okay. Did you speak to a resident of the home?

2 A Yea, Rosalind Johnson.

3 Q Okay. Did Miss Johnson provide you with any information that you
4 thought relevant?

5 A Yes.

6 Q Okay. Did you provide that information to Detective Clark or others
7 who were investigating?

8 A Yes. After talking to her I relayed the information to Detective Clark.

9 Q And what information did you relay to Detective Clark?

10 A That after hearing the gunshots --

11 MR. RION: I guess -- I don't know what
12 he's going to say, but --

13 MRS. KOHLRIESER: Your Honor, it's not
14 for any truth. It's to explain his actions.

15 THE COURT: Well, I don't know what the
16 objection is. The objection is --

17 MR. RION: I guess if it's not for the truth
18 then what's the relevance?

19 THE COURT: I'm going to overrule the
20 objection and allow him to testify. It just explains what he did.

21 MRS. KOHLRIESER: Thank you.

22 A I called Detective Clark and informed him what the witness said, which
23 was she had heard the gunshots. She got up and looked out the front

1 window, which the front window of that house is directly across the street from
2 the alley in which Kenneth Warrington was murdered. She saw what she
3 believed to be a man wearing a camouflage --

4 MR. RION: Objection.

5 THE COURT: Overruled.

6 MR. RION: May we approach?

7 THE COURT: Yea.

8 (WHEREUPON, Court and counsel had a brief discussion at the Bench, on
9 the record, as follows.)

10 MR. RION: Your Honor, unless they're
11 trying to -- well, now they're trying to impeach Rosalind Johnson. She was
12 specifically asked whether or not she could tell it was a man or a woman.
13 She said she couldn't. This is for no other purpose other than to get another
14 version of Rosalind Johnson's story to this jury. There's no other reason. I
15 object and ask that the answer be stricken.

16 MRS. KOHLRIESER: That's absolutely
17 untrue because it goes to, again, when they're in the house for the second
18 search warrant and why they photographed that camouflage and why they
19 took that camouflage. It goes directly to how the investigation proceeded. It's
20 not a way to bootstrap in any way Rosalind Johnson's statement.

21 MR. RION: The jury knows what she said.
22 So, they know what information was gained.

23 MRS. KOHLRIESER: It's the timing of it.

1 THE COURT: I'm going to overrule the
2 objection and let him testify.

3 (WHEREUPON, Court continued on the record, as follows.)

4 Q Please continue, Sergeant Godfrey.

5 A She saw someone wearing a camouflage jacket with a hood up and
6 walking at a fast pace south in the alley, directly towards her house, turn and
7 then walk, or, walk at a fast pace walk west down Pearl Street and then out of
8 her view.

9 Q When you say west, which direction would that take you from her
10 house?

11 A From her house it would be --

12 Q Not direction. What street, I guess, would it take you to?

13 A Oh, Jackson.

14 Q Okay.

15 A They would have went down Pearl towards Jackson Street.

16 Q Do you know where Detective Clark was when you made the call?

17 A As far as I know he was still at the house, at the defendant's house at
18 122 East Eureka.

19 Q Okay. And at that time did you, or, well, you had been there at 122
20 East Eureka; correct, during the search?

21 A Yes.

22 MRS. KOHLRIESER: Nothing further, your
23 Honor. Thank you.

1 THE COURT: Mr. Rion, questions?

2 MR. RION: Thank you.

3 **CROSS EXAMINATION**

4 **BY MR. RION:**

5 Q Sir, I'll show you what's been marked as State's exhibit '118'. I think
6 the prosecutor showed you this exhibit.

7 A Yes, sir.

8 Q So, this is that box, which inside the box was a pistol; correct?

9 A Yes.

10 Q And that's the pistol right there; right?

11 A Yes.

12 Q And this box is sitting on a futon; right? Or, on a bed of sorts?

13 A I'm not sure.

14 Q Some platform; correct, with a bunch of other stuff on it?

15 A Yes.

16 Q And this was early on because the gun is still -- the gun was actually
17 removed; correct?

18 A I know it was removed. I wasn't there when it was removed.

19 Q Okay. And it was removed from the box; right?

20 A I imagine.

21 Q Early on, while the gun was still in the box, this picture is taken;
22 correct?

23 A I wasn't there when this picture was taken. I believe so.

1 Q A broader view of the room, State's exhibit '121'. That appears to be
2 the same box; correct?

3 A Yes.

4 Q Right there?

5 A Yes.

6 Q In that one can you tell whether the weapon was still inside or not in
7 that picture?

8 A From that picture I can't.

9 Q Cannot?

10 A I can't see. It looks fuzzy from my angle. I can see the silver, but if the
11 pistol is in there I can't tell for sure.

12 Q To the best of your recollection is that about how that room appeared
13 when you were in there looking in the closets and such?

14 A I don't remember. I really don't. I remember the closet and looking
15 into the box. That was not there when I saw it.

16 Q Right. That box was in the closet?

17 A Correct.

18 Q And then somebody put it on the bed?

19 A I would presume; yes.

20 Q And the first thing -- there were two searches of the place; right?

21 A There were two search warrants served. I believe officers remained on
22 scene for one search.

23 Q And the first thing everyone was looking for was the weapon; right?

1 A Weapons; yes.

2 Q Weapons; right?

3 A Yes.

4 Q So, that was the primary purpose of the first search warrant, to find and
5 collect weapons?

6 A Correct.

7 Q And then at a later time then after you guys were in there and you
8 looked around you found weapons; right? Individuals found weapons;
9 correct?

10 A Yes.

11 Q And then you realized that you wanted to search more; correct?

12 A We wanted to search for other items; yes.

13 Q Correct. So, then a broader search then occurred; correct?

14 A We obtained another search warrant and then we looked for those
15 items.

16 Q And so first you searched for the weapons and then --

17 MRS. KOHLRIESER: Your Honor, I'm
18 actually going to object because at this point I believe Sergeant Godfrey's
19 testimony was that he wasn't there after he found that. He left and went and
20 did other things. He wasn't present for these things when he keeps saying
21 'you did this'.

22 THE COURT: Well, we'll wait and see
23 what the question is and we'll see where it's going. But, I'll overrule the

1 objection. It's cross examination.

2 Q The question was, simply, first there was a demand from a Court to
3 search for weapons and then later there was a demand from the Court to
4 search for more evidence; correct?

5 A Correct.

6 Q All right. So, let's go to that morning for a second. The first call that
7 you placed to Markelus Carter is at seven fifty-eight in the morning; correct?

8 A That's correct.

9 Q That's the first time that you attempted to contact him?

10 A On that day; correct.

11 Q On that day. Right. You had been, I guess, having a very -- well,
12 Markelus Carter was calling you to resolve this issue with Sonya; right?

13 A Correct.

14 Q Okay. And when you called him at seven fifty-eight on February 23rd
15 he picked up; right?

16 A Correct.

17 Q He didn't try to duck your calls in any way that morning; correct?

18 A Correct.

19 Q And after he picked up you said that you wanted him to come down to
20 the Police Department; right?

21 A Correct.

22 Q And his response to you at that point, he said, or, he asked if there was
23 some progress?

1 A Correct.

2 Q He was asking you if there was progress and to which you took that to
3 be in the context of your relationship and conversation with him about the
4 whole matter dealing with Sonya?

5 A Correct.

6 Q Okay. And you just said, 'well, I just want to talk to you, so just come
7 on down', or something to that effect; right?

8 A Yes.

9 Q Okay. That's about as complicated as the conversation was; right?

10 A Correct.

11 Q You didn't set up a time for him to come down? You just told him to
12 come down?

13 A Correct.

14 Q Now, thirty-four minutes later you called him back; correct?

15 A Yes.

16 Q And, again, he answered the phone; right?

17 A Yes.

18 Q You don't have to leave a voice mail message? He's not trying to not
19 contact you. He answers the phone and says hi to you, or whatever?

20 A Correct.

21 Q At that point you told him it was important for him to come down to the
22 Police Station as soon as he could; right?

23 A I told him it was important and --

1 Q And to come down as soon as he could?

2 A Yes.

3 Q And you still didn't tell him what it's about at that point. He told you
4 that he would be there within an hour; right?

5 A Yes.

6 Q Okay. Then you stressed to him that he should come down earlier
7 than that, like, sooner; right?

8 A Yes. I reiterated that it was important and he should come down right
9 away.

10 Q Yea. And Mark responded and he said, "Well, what's this about?"
11 Right?

12 A Yes.

13 Q And you said that something happened to Kenneth; right?

14 A Correct.

15 Q You didn't say Warrington?

16 A Correct.

17 Q You didn't say Rexford?

18 A Correct.

19 Q Who's Kenneth Rexford?

20 A He is an attorney.

21 Q And did Kenneth Rexford have dealings with Markelus Carter at that
22 time?

23 A I believe so.

1 Q Okay. So, you tell him that something has happened to Kenneth and
2 his response to you is that he doesn't like the way this sounds, or something
3 like that; right?

4 A Yes, that's correct.

5 Q Now, he told you that he had to drop some proofs off and then he
6 would be in essentially; right?

7 A Yes. He had to drop proofs off on High Street.

8 Q Some proofs off on High Street?

9 A Yea.

10 Q So, he's telling you what he is doing and what he has to do and then
11 after he finished that then he was going to come down; right?

12 A Correct.

13 Q That's what he's telling you?

14 A Yes.

15 Q That's eight thirty-two. Is it within minutes of that when you hang up
16 with him after that call that the police effectuate a stop?

17 A I don't know what time they stopped the defendant.

18 Q Okay.

19 A I know it was --

20 Q You were involved in the second, or, the first interview at the jail; right?
21 Or, at the Police Department; right?

22 A Yes.

23 Q And that started around nine-thirty or so?

1 A Yes.

2 Q So, that's after the interview is actually beginning; right?

3 A Correct.

4 Q Did you go out to the place where his car was stopped and he was put
5 in the cruiser and all?

6 A I did not.

7 Q So, you were there at the department waiting for him to be brought
8 back?

9 A Correct.

10 Q That was on your request that he be brought in?

11 A We wanted to talk to him.

12 Q Right. Let me put it another way. Was it you -- who was it that placed
13 whatever you want to call it, the order/request to --

14 A There was no order. We wanted to speak to him about --

15 Q I understand.

16 A -- his involvement.

17 Q Who communicated the request then? I'm not trying to play with
18 words.

19 A Oh. Well, I wasn't out there, but my understanding is Detective Clark.

20 Q Detective Clark put this whole thing in motion to have him brought into
21 the Police Department?

22 A I believe he was out at the traffic stop scene and talked to the
23 defendant and the defendant willingly came in to talk with us.

1 Q And then when he first entered into the Police Station were you there
2 talking? Did you see him then or were other officers with him at first before
3 the video starts?

4 A They walked him upstairs, or, brought him upstairs and put him directly
5 into an interview room.

6 Q The first time you have contact with him, is that when the video starts?

7 A I don't believe. Well, I don't recall. I'm not sure if there was any
8 conversation prior to that. If there was, it was --

9 Q So, there may have been a conversation explaining what's going on
10 essentially, or some of the details of things before he enters into that room;
11 correct?

12 A Not that I recall. If there was anything substantial I would have
13 documented it.

14 Q With you?

15 A So, no, I don't believe there was. I don't recall.

16 Q Okay. With you. So, in other words, we have the time when the police
17 stopped him and we have the time when the interview starts. So, there's a
18 period of time. Did you see him when he initially entered into the Police
19 Station? I guess that's my question.

20 A No.

21 Q Okay. So, what happened before you saw him, well, obviously you
22 don't know?

23 A Yea, I don't know.

1 Q All right. Do you recall during that first interview -- well, it's being audio
2 and videotaped; right?

3 A Correct.

4 Q And how obvious -- well, like here we have, it's pretty clear, cameras
5 all of the place. Anyone that looks around would realize that at least this part
6 of the Courtroom is being videotaped. Are there cameras like that, so
7 obvious in these interview rooms? Or, are they a little more hidden?

8 A They're in the corner of the interview room. Off the top of my head I
9 can't tell you if it's a camera. I think it's covered.

10 Q Okay.

11 A Probably to prevent people from tampering with it. But, most people
12 that come in can look up and know it's a camera.

13 Q But, it's a covered thing? It's not obvious that it's a camera, but it may
14 be obvious that there's something behind the glass or whatever?

15 A I think in today's day and age anyone would look up and believe it's a
16 camera.

17 Q The question is - it doesn't -- all right. Well, I think it's clear. Did you
18 tell him that he was being videotaped?

19 A No.

20 Q Okay. And when he's having conversations -- when you guys leave
21 the room and he's in there by himself was he informed at that point that he
22 was being recorded in any way?

23 A No.

1 Q Okay. At the beginning of the interview, that second interview, there
2 was some behavior that made you ask him if he was okay, et cetera, and
3 things like that; correct?

4 A Yes.

5 Q It sort of comes off a little mumbled, but he's trying to say that he would
6 like some medication; is that correct?

7 A He asked for Dilaudid.

8 Q Dilantin maybe?

9 A Maybe. I'm not sure.

10 Q Do you know what Dilantin is?

11 A No.

12 Q Now, you testified during direct that you spoke to Rosalind Johnson;
13 right?

14 A Correct.

15 Q And essentially she testified to you -- can you see where everything is
16 here?

17 A (Inaudible.)

18 THE COURT: Mr. Godfrey, bend that
19 microphone around because we can't hear you too well if it's not.

20 A It's an aerial view --

21 Q You can sit down. I'll move it this way and that will make it easier.

22 A Oh, okay. This is the first time I've looked at the aerial view. There's
23 multiple alleys that go all the way through. Is this where the homicide

1 happened? It looks right with the concrete.

2 Q So we can see here, point out to the jury so they can see it.

3 MRS. KOHLRIESER: Your Honor, do you
4 mind if I move a little bit so I can see?

5 THE COURT: No problem.

6 Q You can see a little shed right there; right? There was a house here at
7 the time; correct? Or, do you recall?

8 A I don't know.

9 Q All right. Where was Miss Johnson's house on this?

10 A It is right here at the bottom of the alley. It's going to be one of these
11 two houses. I believe it's this house. I'd have to go out there. I remember
12 looking out her house. It had a big front window and you had a view of
13 directly down the alley. By my memory I believe that her house was just, from
14 the jury's point of view, just right of where the alley was. So, I believe this
15 would have been her house.

16 Q And she described -- well, the information that you provided was that
17 she described a person -- where did she say she first saw him at?

18 A Walking south in the alley.

19 Q Okay. So, all the way down the alley and then turning this way on the
20 street?

21 A Correct.

22 Q Is that essentially your involvement in this case as you've described
23 both on direct and on cross? In other words, you were involved in the two

1 interviews and speaking to a witness or two in the neighborhood? Is that
2 what you did in this case?

3 A Yea.

4 MR. RION: If I could just have one
5 second, your Honor?

6 THE COURT: Okay.

7 (WHEREUPON, Court went off the record briefly.)

8 MR. RION: Thank you. Nothing further.

9 THE COURT: Any redirect?

10 MRS. KOHLRIESER: Just a couple of
11 things.

12 **REDIRECT EXAMINATION**

13 **BY MRS. KOHLRIESER:**

14 Q You had -- let me ask you - had you called the defendant before,
15 before what happened on February 23rd, back when you were dealing with
16 the week before and you were dealing with the December 17th, 2007
17 incident, had you called the defendant?

18 A Yes.

19 Q Do you have any idea whether the phone number that you called has
20 caller I.D.?

21 A I have no idea.

22 Q And then what we seen on that video there a few minutes ago, is that, I
23 guess, well, what is that room that you're in?

1 A It's an interview room. It's whole purpose is for us to conduct
2 interviews.

3 Q Okay. It appeared there was a table and like three chairs in there?

4 A Yes.

5 Q And where are people that you are going to interview typically seated?
6 Where do you typically seat them?

7 A They typically sit in a chair farthest away from the door. That way
8 they're facing the camera.

9 Q Okay. So, the camera would be behind you then when you're sitting?

10 A Correct.

11 Q You, yourself, are sitting in the chair directly across from your person?

12 A Yes. The suspect that we're interviewing, the camera would be directly
13 over our head.

14 Q Okay.

15 A In one of the corners.

16 Q Okay. And you said you believe there is a covering over it?

17 A Yes.

18 Q Okay. Is that -- well, these domes that you see, like the darkened
19 dome, is that what you're talking about?

20 A I know it's there. I can't remember the last time I looked up at the
21 camera. I really don't recall. To the best of my recollection --

22 MR. RION: Your Honor, I'll object if he
23 doesn't recall.

1 THE COURT: Sustained. Sustained.

2 MRS. KOHLRIESER: That's absolutely
3 fine.

4 Q Do you know whether that camera has anything to hide it, such as a
5 plant, books, or anything like that?

6 A No.

7 Q Are you familiar with the term such as hidden camera?

8 A Correct.

9 Q Would you classify the camera that's in that interview room that way?

10 A No, I would not.

11 Q Okay. Mr. Rion was asking you about Rosalind Johnson's statement
12 to you. He used the words 'she saw him walking all the way down the alley'.
13 Do you remember if those were Rosalind Johnson's exact words?

14 MR. RION: Objection. Leading. He's the
15 one testifying.

16 MRS. KOHLRIESER: Your Honor, those
17 were the words that he used. I'm trying to clarify that answer.

18 THE COURT: Okay. Okay. Objection is
19 overruled. Go ahead.

20 A If those were her exact words? I do not know.

21 Q Would looking at your report refresh your recollection?

22 A Yes, it would.

23 Q I'll hand you your report. I'd ask you to just take a look at that and

1 read it to yourself. Tell me when you're done.

2 (WHEREUPON, witness reviewed report.)

3 A Okay. It does not say 'all the way down the alley'.

4 Q Hold on.

5 A Oh, sorry.

6 Q Does that refresh your recollection?

7 A Yes.

8 Q Okay. Do you remember Rosalind Johnson using the words 'saw him
9 walking all the way down'?

10 A I do not.

11 MRS. KOHLRIESER: Nothing further, your
12 Honor.

13 THE COURT: Any recross?

14 **RECROSS EXAMINATION**

15 **BY MR. RION:**

16 Q You were calling Markelus' cell phone; correct?

17 A Say that again?

18 Q The number that you were calling to get into contact with Markelus,
19 that was his cell phone; correct?

20 A Yes.

21 MR. RION: Nothing further.

22 THE COURT: Okay. You may step down.

23 Thank you. Before the State calls its next witness I want to give the jurors

1 another instruction. It's similar to the instructions I've already given. I'm not
2 trying to dwell on this and overemphasize this, but it is important. The
3 discussion from Officer Godfrey and his testimony regarding the defendant
4 being arrested for a Weapon Under a Disability and the discussion about the
5 guns that were found on 2-23-09, I think it was a .357 and the gun that was in
6 the closet, they are not the same thing that we're talking about in Count Two
7 in this case. So, I don't want you to get confused and think those guns that
8 they're talking about on February 23rd of '09 are any one of the same gun
9 that they're talking about in Count Two in the indictment. So, I want to make
10 sure.

11 Also, the fact that the defendant was arrested for a Weapon Under a
12 Disability back on February 23 of '09 and all this discussion about the things
13 that occurred in December of '07 and leading up to that, well, any of those
14 things that are prior actions of the defendant aren't presented and you can't
15 consider them to say, okay, that happened then and he acted in conformity
16 with it in the instance that we're talking about in terms of Count One and
17 Count Two. You can't use that to show his character and that he acted in
18 conformity with it. There's very specific rules and I'll instruct you the only
19 purpose for that testimony that you can use it for is to either show the identity
20 of the defendant to whom the officers were dealing with or that he may have
21 had a motive or knowledge of the facts surrounding the case.

22 But, again, it doesn't have to do with Count Two - the weapons at the
23 house, the .357 and, well, I think it was a nine millimeter Glock in the closet.

1 They are not the subject of Count Two and you can't say, well, that happened
2 then and that shows his character and he must have acted in conformity with
3 that character. You can't use it for those purposes. I'm not trying to
4 overemphasize this. I've said it before. But, it is important that you keep that
5 in mind. Okay?

6 Does the State have a witness that you believe would be, in your best
7 estimate, rather brief?

8 MR. MILLER: I think so, your Honor. Yes.

9 THE COURT: We'll see. Call your next
10 witness.

11 MR. MILLER: Sergeant Cameron Smith.

12 THE COURT: Is everybody good if we try
13 one more brief witness? Okay.

14 MRS. KOHLRIESER: Your Honor, with the
15 Court's permission, may I step out just to get the witness after him lined up?

16 THE COURT: Sure. Next witness?

17 MR. MILLER: Cameron Smith. Sorry. I
18 thought I said it.

19 THE COURT: You probably said it. I
20 wasn't paying attention.

21 WHEREUPON, called to appear as a witness in this proceeding was one:

22 **SERGEANT CAMERON SMITH**

23 who, having been duly sworn by the bailiff herein, testified as follows:

1 BAILIFF: He has an objection.

2 THE COURT: Okay. This witness is
3 exercising his right and is requesting that he not be photographed or
4 videotaped. So, I would ask the media to honor that request. Your witness,
5 Mr. Miller.

6 MR. MILLER: Thank you, your Honor.

7 **DIRECT EXAMINATION**

8 **BY MR. MILLER:**

9 Q Mr. Smith, good afternoon.

10 A How are you?

11 Q Good. Can you state your full name for the record, please?

12 A Cameron Brent Smith.

13 Q And where do you work, Mr. Smith?

14 A At Allen Corrections.

15 Q And what is your job title?

16 A I'm a Sergeant.

17 Q Okay. What are your job duties as a Sergeant out at Allen Corrections?

18 A I have several. As a Sergeant I'm responsible for two hundred and
19 eighty men. I do and organize the cleaning schedules. I work with the
20 officers. When the inmates violate rules I hear conduct reports. I give out
21 sanctions anywhere from jumpsuits to taking their money to phone
22 restrictions. There's all sorts of sanctions. I also -- oh, I do a lot of stuff. I do
23 investigations.

1 Q Okay. I was going to ask you, and we'll get right to that.

2 A Yea, I do investigations through my unit from theft loss investigations,

3 plus as the S.T.G. coordinator, and --

4 Q What does that mean?

5 A 'Scuse me?

6 Q You rattled off some initials. What did those mean?

7 A S.T.G.? Security Threat Groups.

8 Q What is a Security --

9 A Gangs, hate groups, cults, things like that.

10 Q Are you saying you investigate those kind of groups?

11 A I investigate them. I profile inmates. I enter information into D.O.T.S.

12 and it actually goes to the police officers on the streets and LEADS.

13 Q What is D.O.T.S.?

14 A Department of Finger Tracking System.

15 Q Okay.

16 A It's the computer program we use.

17 Q Okay. And what does that do?

18 A It collects information, all sorts of information, on the inmates from
19 when they're released, to parole hearings, when they're coming up. It does
20 classifications, security classifications. It's a myriad of everything that we do.

21 Q Do you use it as a reference?

22 A I do.

23 Q Do others use it as a reference?

1 A Many.

2 Q Okay. Now, you mentioned Allen Correctional. Just for clarification for
3 the record, is that the prison that's here in Allen County?

4 A It's Allen Oakwood Correctional Facility technically.

5 Q Okay. It's here in Lima?

6 A Yes.

7 Q Okay. You mentioned your job duties. Do you do those for all the
8 prisons in Ohio, or just a select few, or one?

9 A Just for Allen Oakwood Corrections.

10 Q Now, were you at some point asked to assist Detective Clark of the
11 Lima Police Department in an investigation into a person named Markelus
12 Carter?

13 A Correct.

14 Q Is that yes, you were?

15 A Yes.

16 Q Okay. Do you recall when you were contacted?

17 A I don't remember the date. I would have to refer back to my report. It
18 was a few days before my report, I believe.

19 Q Would referencing your report, or reviewing your report, help your
20 recollection to answer that question?

21 A It probably would. Sure.

22 Q Okay.

23 THE COURT: If it's going to be an exhibit,

1 it needs marked. If it's not going to be an exhibit, --

2 MR. MILLER: It's not going to be an
3 exhibit.

4 A It was a few days.

5 Q Okay. I'm going to hand you a document. Is it Investigator Smith, or
6 Sergeant Smith?

7 A Sergeant Smith.

8 Q Sergeant Smith, I'm going to hand you a document. Can you tell me
9 what that is?

10 A That's the report I wrote.

11 Q With reference to?

12 A With reference to Markelus Carter and the people I interviewed.

13 Q Okay. Does that help you determine about what time, the date, that
14 Detective Clark contacted you?

15 A Yea, it does. It's approximately three or four days before, I believe.

16 Q What would be the date that he contacted you?

17 A I really can't say exactly what date to lock it in. I don't want to
18 misspeak.

19 Q Okay. Can you give me an approximation of when he contacted you
20 by referencing your report?

21 A Are you asking the date again?

22 Q Well, I'm asking you if you can tell by review of your report what date
23 Detective Clark asked you to assist in his investigation, or, in an

1 investigation?

2 A A few days before. I'm assuming a few days before February 8th,
3 2014.

4 Q February of 2014? A few days before February 8th of 2014?

5 A Yea. Yea, somewhere in there.

6 Q Okay. Did you actually assist in the investigation that Detective Clark
7 asked you to do?

8 A Yea, I did what I was asked; yes.

9 Q Okay. What did Detective Clark ask you to do?

10 A To go back and find out who his cellmates were.

11 Q Who's he? I'm sorry.

12 A Mr. Carter.

13 Q Mr. Carter? Okay.

14 A Yes. And then talk to them to find out if he had any involvement in any
15 prior crimes.

16 Q Okay. Now, did Detective Clark discuss with you, and I'm specifically
17 referencing Detective Clark, did he discuss with you any facts or
18 circumstances that might be important to Detective Clark?

19 A I believe so; yes.

20 Q Okay. Did that help you in your investigation as you did your
21 investigation in determining what might be important if somebody told you
22 something and what might not be important?

23 A Absolutely.

1 Q Was that helpful to you in that regard?

2 A Absolutely. I would be interviewing blind if I didn't.

3 Q Now, those circumstances or facts that Detective Clark may have
4 relayed to you which would better aid in your investigation, did you actually
5 talk to any individuals out at the prison?

6 A Yes.

7 Q Did you -- when you talked to individuals out at the prison did you relay
8 the facts that Detective Clark told you to them?

9 A Absolutely not.

10 Q Okay. Why not?

11 A That would ruin any -- it would spoil the information that was received.
12 It wouldn't be worthy of reporting then.

13 Q Now, did you, indeed, talk to a number of individuals that had -- well,
14 let me ask you this so we can just use sort of a colloquialism here. Are you
15 familiar with the term cellie?

16 A Absolutely.

17 Q Okay. What's a cellie?

18 A A cellie is someone that they cell with within the confines of their cell.

19 Q Okay. So, somebody they live with in their cell?

20 A They live with them.

21 Q Okay. So, if I use the word cellie you know what I mean?

22 A Absolutely.

23 Q Did you, in fact, at Detective Clark's request, talk to Markelus' cellies?

1 A I did.

2 Q Okay. Did any of them have any pertinent information that they
3 relayed to you?

4 A The cellies did not.

5 Q Okay. Was there at some point, after you talked to the cellies, was
6 there at some point that someone came to talk to you about the information
7 you were seeking?

8 A Yes.

9 Q Okay. Who was that person?

10 A That was Mr. Upham - inmate Upham.

11 Q And do you know his first name?

12 A Stephen.

13 Q Okay. And when you spoke to -- well, let me ask you this. Do you
14 remember the date you spoke to Stephen Upham?

15 A It was the same date as the report.

16 Q Okay. Did he have what you felt was information helpful to Detective
17 Clark's investigation?

18 A He did.

19 Q Now, before Mr. Upham relayed this information to you, again, did you
20 relay any facts to Mr. Upham that Mr. Clark relayed to you?

21 A No.

22 Q Did you at any point promise Mr. Upham anything in exchange for the
23 information that he gave?

1 A Never.

2 MR. MILLER: One second, your Honor.

3 THE COURT: Okay.

4 (WHEREUPON, Court went off the record briefly.)

5 Q Sergeant Smith, you mentioned that you do investigations at Allen
6 Oakwood.

7 A Yes, sir.

8 Q Do you ever have inmates use other inmates to send letters?

9 A Oh, absolutely. That's common.

10 Q You've investigated that sort of thing?

11 A Absolutely.

12 Q Okay. Are inmates allowed to use cell phones --

13 A No.

14 Q -- in the prison?

15 A No.

16 Q Have you ever found an inmate to have a cell phone in the prison?

17 A Oh, yes.

18 Q Is that a violation of prison rules?

19 A It is.

20 Q Let me just ask you this - are people able, are people actually able to
21 smuggle things into the prison?

22 A Unfortunately all too often.

23 Q What kinds of things do they smuggle into the prison?

1 A Just about any kind of drug you can think of; suboxone strips;
2 marijuana; heroin. They smuggle cell phones. That's always a constant
3 battle because they can coordinate. So, there's just a myriad of --

4 Q You mentioned coordinate. Why are cell phones a problem in our
5 prisons?

6 A Well, you can coordinate an attack on a staff member so that there
7 would be less seen. You could go ahead and organize a way of conveying
8 the contraband into the institution, including where the perimeter vehicles are.
9 There's a list of -- I mean, you could talk about it all day.

10 Q Okay. Now, you mentioned that you had spoken to a number of other
11 inmates, other than Mr. Upham. Did you promise any of those inmates
12 anything in exchange for any information they might have?

13 A No. No.

14 MR. MILLER: I have nothing further.

15 THE COURT: Any questions, Mr. Rion?

16 **CROSS EXAMINATION**

17 **BY MR. RION:**

18 Q Good afternoon, sir.

19 A How are you?

20 Q On direct examination you stated that you had cellmates come in and
21 you asked them whether or not they were aware of any crimes. I think that's
22 the way you phrased it; right?

23 A Yes.

1 Q You were more specific than that as related to the investigation;
2 correct?

3 A No. May I elaborate?

4 Q Sure.

5 A I mean, I would say, "Have you discussed or have you ever had any
6 conversations about any of his past criminal activity?"

7 Q And that was as specific as you got with them?

8 A Correct.

9 Q And why was that?

10 A I don't want to lead the person I'm interviewing in a direction to where
11 they can make something up and I would get hooked by some fabricated
12 story.

13 Q In other words, if you told them, 'I'm looking at the theft of a pack of
14 gum on Main Street', well, you didn't want to put the idea of a theft offense
15 and, 'oh, yea, I know about that', and them then make up a story about it;
16 correct?

17 A Correct.

18 Q And if you even let them know whether you're looking at a theft case,
19 or a bank robbery, or whatever, same thing? Now you're focusing in on the
20 type of crime. You would be signaling to them, I guess, what they would be,
21 or, what you would be wanting them to talk about and that could also lead to,
22 or curve the interview in a way that you didn't want it to go; correct?

23 A Correct.

1 Q So, it's safe to say that the technique that you used was that you would
2 bring in various people and say, "Look, if you have any information about Mr.
3 Carter, I'm seeking it. Do you have information?" Well, I think you said, "Do
4 you have any information about any other crimes?" I'll leave it at that. Right?

5 A Up until the very end of the interview; yes.

6 Q What do you mean?

7 A At the end of the interview I told them how serious this was and I
8 believe I even said at the very, very end, "This is a murder investigation and
9 you shouldn't talk about this." That was at the very end.

10 Q Okay.

11 A That's as they were walking out the door.

12 Q Okay. So, this is to, say, Thomas Smith, as an example, you would
13 have told him that he was being looked at, or, that Markelus was being looked
14 at as a suspect in a murder case; correct?

15 A At the end of the investigation.

16 Q So, you interview Thomas Smith on the date of your report. Is that on
17 February 8th, 2014? Is that when you interviewed Thomas Smith?

18 A I believe so; yes.

19 Q Okay. And you didn't interview Stephen Upham on that same day;
20 right?

21 A I believe it's in my report. I'm sure I put the date on it.

22 MR. RION: May I approach the witness?

23 THE COURT: Yes.

1 Q To refresh your recollection --

2 A Oh, interview him? No. No. He came to me.

3 Q Right. What day did you speak with Stephen Upham about this?

4 A This was the 21st.

5 Q Okay. So, you didn't interview -- so, Thomas Smith you spoke to on

6 February 8th and then a week or two later, almost two weeks later then,

7 Stephen Upham comes into your office and says that he has information that
8 you wanted?

9 A Yes.

10 Q That's the way he states it? I have -- he has information that I want.

11 He came to me and he said, "I have information that you want."

12 A Yep.

13 Q Okay.

14 A Yes, sir.

15 Q So, he knew that the -- well, word had gotten out somehow that you
16 were wanting to talk to people; right?

17 A Oh, I'm sure it did.

18 Q And for two weeks time or so it's percolating and then Stephen Upham
19 comes to you on the 21st of February, 2014; correct?

20 A Yes, sir. Yea, it's going back a year and a half and so I've got to refer
21 to the report.

22 Q Well, by law I can't ask you what he told you.

23 A Understood.

1 Q So, I'm not going there with it. You said Detective Clark had shared
2 with you various information about the case?

3 A Yes.

4 Q About his investigation before that; correct?

5 A Some; yes.

6 Q And you have people in your institution that -- well, for instance, if they
7 get a five year sentence or a four year sentence they don't necessarily have
8 to do that period of time; correct?

9 A That's correct.

10 Q There's various ways for that to be reduced. Would one way for a
11 sentence to be reduced is this concept called judicial release?

12 A Yes.

13 Q Is that a situation where the Court, upon a Motion of the lawyer for the
14 defendant, or I guess the defendant himself could file his own Motion, but ask
15 the Judge to release him early for a whole host of reasons?

16 A I don't know. That's beyond the scope of my duties.

17 Q But, you see that happening?

18 A I see judicial releases. Now, how they come about, I don't really know
19 the full understanding of it all; no.

20 Q Okay. So, you've seen people that come in the front door of your
21 prison and they get a seven year sentence, but that doesn't necessarily mean
22 that they're going to serve seven years? There's other factors that could
23 cause them to be released early? Is that a fair statement?

1 A Right.

2 Q Thank you, sir.

3 THE COURT: Any redirect?

4 MR. MILLER: Very briefly, your Honor.

5 THE COURT: Very brief.

6 **REDIRECT EXAMINATION**

7 **BY MR. MILLER:**

8 Q I think you mentioned it kind of on the fly, and when I say that I mean
9 as you were just in conversation with Mr. Rion, but did Upham come to you or
10 did you go to Upham?

11 A No, he came to my office on his own. Nobody called him.

12 Q Okay.

13 MR. MILLER: No further questions.

14 THE COURT: Okay. Any recross?

15 **RECROSS EXAMINATION**

16 **BY MR. RION:**

17 Q I think the question is obvious, but that would imply to you that he had
18 heard about your request from somebody else?

19 A Do you want me to answer something?

20 Q I think you did by nodding your head; but, you can say 'yes'.

21 A Or overheard; yea.

22 Q Okay.

23 MR. RION: Nothing further.

1 THE COURT: Okay. All right. You may
2 step down.

3 A Thank you.

4 THE COURT: Congratulate counsel - that
5 was relatively brief. We'll take a break now. Again, this is sort of, well, just
6 like I just got done telling you with the last witness - there's evidence here that
7 the defendant had some cellies and was incarcerated. If you believe that
8 evidence you can't use that evidence to show his character or that he acted in
9 conformity with it in relationship to the charges in this case. That type of
10 evidence, the fact that he was incarcerated and had cellmates, could be used
11 for other purposes, perhaps to show the identity of who we're talking about or
12 to show that he would have had some kind of a motive or preparation or
13 something like that. But, you can't use it to show, okay, he was incarcerated
14 and that shows his character and he must have acted in conformity with that
15 character with respect to these allegations. You can't use it for that reason.
16 Okay?

17 So, let's take a break here for about fifteen minutes. Remember the
18 admonitions. That's like a broken record, but I've got to say it each time.
19 Don't discuss the case among yourselves or with anyone else. Don't come
20 into contact with any of the parties. Don't formulate or express any opinions.
21 Don't pay attention to any media accounts of the case. Don't do any
22 independent research.

23 We'll be in recess until about a quarter after three. The State will have

1 another witness ready?

2 MR. MILLER: We'll have one. I believe
3 so. We'll check on the break.

4 MRS. KOHLRIESER: I arranged it
5 already. We're good.

6 THE COURT: All righty. Okay. We're in
7 recess.

8 (WHEREUPON, COURT WAS IN RECESS.)

9

10 THE COURT: Okay. I'll just indicate for
11 the record again that it's about three-thirty now on the 16th of September,
12 2015 in Case Number CR2014 0139, State of Ohio -vs- Markelus Q. Carter.
13 The defendant is present with counsel. The State is back in. The jurors have
14 been brought back in from the last recess.

15 Ladies and gentlemen, during the recess, and I appreciate again that it
16 was extended, but believe me we're trying to minimize the delays and the
17 waits. I think you're understanding, or maybe you don't just quite understand
18 yet, but some of those things are just unavoidable. We've got another
19 witness lined up. But, given that it's three-thirty and given you folks on the
20 jury have been troopers and have had a long day and I understand the next
21 witness may be a little lengthier, well, we're going to break early. I apologize
22 if that causes inconvenience. That means that we'll reconvene tomorrow and
23 try to go as quickly as, well, I understand the State has a few more witnesses

1 to put on. So, we're getting close to the end of the State's case. But, the
2 Court's just making the decision so we don't go too long this afternoon to
3 break early. So, we'll let you guys go.

4 Now, the other thing, I have a couple of things in the morning. Again,
5 I've been trying to do things at the eight and eight-thirty hour every morning.
6 To the extent that that has caused some delays, I apologize for that, too. So,
7 what we'll do is we'll do kind of a compromise and not have you folks here
8 until about nine-fifteen. I think then we can take care of things that I have to
9 take care of. If you get here at nine-fifteen and then we can promptly, well,
10 around that nine-fifteen hour get started. Okay?

11 Remember the admonitions. Don't discuss the case among
12 yourselves or with anyone else. Don't do any independent research. Don't
13 do anything on social media or the Internet. Don't listen to any media
14 accounts or pay attention to or read any media accounts. Don't discuss it
15 among yourselves or with others. Don't formulate or express any opinions.
16 Certainly if anything comes to anyone's attention that you feel like it's going to
17 interfere with your ability to be fair and impartial let Monica know as soon as
18 you can.

19 I hope everybody gets some sleep. Get some rest. Whatever you ate
20 for lunch today, don't eat it tomorrow. All right. Take care. Let us know if
21 there's any issues. But, the jury will be excused for the evening. Get some
22 rest and we'll see you at nine-fifteen tomorrow morning.

23 (WHEREUPON, JURY WAS EXCUSED FOR THE DAY AT 3:35 P.M.)

1 THE COURT: Okay. The jurors have left.
2 I just want to go on the record then that the Court was made aware of
3 something that occurred during the recess. We've had a conversation in
4 chambers. Unless someone feels compelled at this point I don't want to put
5 anything on the record about that now. We've had the discussion and there's
6 some further looking into that that needs to be done. I've spoken with the
7 prosecutors and Mr. Rion about how information about that can be gained
8 and exchanged. The Court wants to get all the information it can. If need be,
9 tomorrow morning we can put things on the record in that regard. Okay? Fair
10 enough?

11 MRS. KOHLRIESER: Fine by the State,
12 your Honor.

13 MR. MILLER: Yes, sir.

14 THE COURT: Anything else?

15 MR. RION: What time would you like us?

16 THE COURT: I have an eight o'clock and
17 an eight-thirty. It's a sentencing. I think if you're here - and I know I kind of
18 stretched things out this morning, too - but, try to get here about eight
19 forty-five, a half hour ahead of the jurors. If we need to put things on the
20 record about that, we can. Certainly we can have more discussion. Any
21 information that the State gets concerning whatever occurred during the
22 break --

23 MRS. KOHLRIESER: Absolutely, your

1 Honor.

2 THE COURT: If we can take care of that
3 before Mr. Rion leaves the building?

4 MRS. KOHLRIESER: That's what I was
5 going to say. If he wants to hang around? As soon as that's done --

6 MR. MILLER: I can update whatever
7 information we have.

8 THE COURT: And anything that you have
9 make sure I'm aware of before it's sprung on me tomorrow morning at
10 eight-thirty. Is that fair?

11 MRS. KOHLRIESER: Yes, your Honor. I
12 told the Sheriff myself what you wanted.

13 THE COURT: Okay. I'm going to hang
14 around. Our hours are until four-thirty normally. So, we'll be around at least
15 until then. Okay?

16 MRS. KOHLRIESER: Thank you.

17 THE COURT: Anything else?

18 MR. RION: If you could just give that
19 Judge in Cleveland my regards? So, thank you.

20 THE COURT: Okay. All right. I'll talk to
21 you all tomorrow.

22 **(WHEREUPON, COURT RECESSED FOR THE DAY AT 3:37 P.M.)**

23

1 THURSDAY, SEPTEMBER 17, 2015

2 9:32 A.M.

3
4 THE COURT: All right. The record will
5 show that today is the 17th of September, 2015. We're reconvening in
6 CR2014 0139, State of Ohio -vs- Markelus Q. Carter. The defendant is
7 present in Court with his attorney. The State is present. The jurors have
8 reported, but they are not in the Courtroom.

9 We need to go on the record on a few things. As we recessed
10 yesterday afternoon obviously we put on the record that there had been, well,
11 I'll just call it an incident at this point, in the holding room. We broke and
12 excused the jurors for the day when that happened. My understanding is that
13 that incident, because of the security system that the jail has, was videotaped.
14 So, number one, I wanted to make sure that the video was obtained and then
15 both the defense and the prosecution had that and had a chance to review
16 that video and then we can have a discussion about what, if anything, we're
17 going to do about that.

18 So, first off, I think the State of Ohio can represent the video of the
19 security camera video from the incident has been downloaded?

20 MR. MILLER: Yes.

21 THE COURT: You guys have a copy?

22 MRS. KOHLRIESER: Yes, your Honor.

23 After we adjourned they were working on getting it. They, being the I.T.

1 department for the jail and things like that. Mr. Rion stayed initially and then
2 asked me about e-mailing it. I explained to him my limitations in that regard,
3 but that I could see about it. It was my belief at that point that Mr. Rion had
4 left for the day. It was probably ten/fifteen minutes after that when I went
5 down and spoke to the I.T. people myself about, you know, where's the video.
6 Someone told me that they thought I.T. could probably e-mail it to Mr. Rion for
7 me and when I spoke to the I.T. guy he said that the file was too large or
8 something of that nature and we couldn't e-mail it.

9 THE COURT: Nonetheless, a disc has
10 been made and then you got a disc this morning then, Mr. Rion, as I
11 understand it?

12 MR. RION: I received it and I have
13 reviewed it with Mr. Carter.

14 THE COURT: Okay. Again, the record will
15 show we're running a little bit behind because when the Court found out that
16 Mr. Rion didn't have the video yesterday and just got it this morning I wanted
17 to make sure that he had the opportunity to review that with his client if his
18 client wanted to review it with him. So, that's been done. So, everybody's got
19 that.

20 I don't have a disc. I don't know if you have an extra disc. I will state
21 for the record that yesterday afternoon, after everyone had left, I did, well, I
22 think I viewed, and I don't know if I viewed the whole thing because I don't
23 know what's on the whole DVD, but I did see at least part of what happened

1 in the security office on their computer. That was after everybody left
2 yesterday. But, if you have an extra copy?

3 MRS. KOHLRIESER: Your Honor, the
4 extra one that was given to us I gave to Mr. Rion. I guess my point of that
5 was I called Mr. Rion immediately and left a message that I couldn't get him
6 the video e-mailed.

7 THE COURT: Well, I guess, and we're
8 about to have a discussion as to what, if any, use that will have in the trial.
9 Depending on how that turns out, whatever the case be, obviously if it is
10 used, if I allow it to be used in the trial, it will be in the record. If I don't allow it
11 to be used in the trial I want a copy of it filed. It will be a Court exhibit
12 because I want there to be a record of that, what transpired, in any event.
13 Okay?

14 MR. MILLER: We can do that.

15 THE COURT: All right. So, now let's get
16 to the heart of the issue here. With that occurrence yesterday it's my
17 understanding, based on conversations in chambers, that the State was
18 intending to use that in evidence. Is that correct?

19 MRS. KOHLRIESER: Yes, your Honor.

20 THE COURT: And that the defense
21 obviously was objecting to that. Mr. Rion, you had indicated in chambers also
22 that you might have some other things you want to put on the record in that
23 regard. So, given the fact that there's a representation that the State

1 intended to offer that as evidence in this case I'll turn to Mr. Rion then and
2 you can put on the record any objections, any motions, or anything you want
3 to put on the record with regard to the DVD of the incident and the incident
4 itself that occurred yesterday. Mr. Rion?

5 MR. RION: Your Honor, this case has
6 been pending for a long time. I guess I'll address the Court's first inquiry as
7 far as the State's motion, or, intent to enter this into evidence. This case has
8 been pending a long time and there's been no incident that would cause
9 concern as far as Mr. Carter's behavior. The creation of this incident wasn't
10 Mr. Carter's fault. I accept the representations and I truly believe that it was a
11 complete accident in this matter that this situation was even created. That
12 being said, it's very clear that there was, well, that words were exchanged.
13 Those words are not captured on the video. But, I think there's a back and a
14 forth. Mr. Upham said some things to Mr. Carter. Mr. Carter said some
15 things to Mr. Upham. Your Honor, I believe that if the Court were to admit this
16 into evidence, one, that it would be very, very prejudicial. The only argument
17 that could be made in my mind is that it's being used to show Mr. Carter's,
18 well, their argument as to his character. Obviously we're at a very sensitive
19 part of this trial and emotions are running high. It really wasn't -- Mr. Carter
20 wasn't seeking this meeting, this confrontation. Nor was he seeking to have a
21 conversation with Mr. Upham. So, I would ask the Court to exclude it on 404
22 issues and on 403. It just clearly would be other acts evidence. It's a
23 non-charged event that happened for a matter of seconds. I could not

1 imagine something more prejudicial to go in front of this jury than this video
2 and testimony in relation to it. It's a separate act and it seems like the animus
3 of it had little to do with the other exceptions in 404.

4 On top of that, at this time, and I know it was an accident, but it
5 happened. If Mr. Upham were to testify, well, I don't know if he has any
6 visible marks or anything at this point. But I, again, would ask for a mistrial if
7 he is going to testify. The jury is going to see these marks on him and if they
8 have any -- well, my second concern is that the jurors may have heard about
9 this either through the press, as it's my understanding there were two articles
10 run in the newspaper and there's video here and so I assume there was some
11 video taken as well, and also I think there were jurors that were around the
12 Courthouse at the time that this occurred and then they have been a witness
13 to at least the reactions of Court personnel and/or statements made by
14 officers while they were trying to deal with the situation.

15 So, those are my two issues and those are my arguments, I guess.

16 THE COURT: All right. Does the State
17 want to respond?

18 MRS. KOHLRIESER: Yes, your Honor.
19 Thank you. There's a couple of things that have been mentioned by Mr. Rion
20 here. First off, and I'm going to kind of address this a little bit backwards from
21 how Mr. Rion presented them. As to the mistrial and Mr. Upham's injuries
22 and things of that nature, every injury that's visible was caused by this
23 defendant. That's of his own creation.

1 As to the statement that due to no fault of Mr. Carter, as far as that
2 goes, well, we also have Tim Enyart, who I would note for the record is
3 present in Court and he was our Court security officer in here yesterday and
4 he is the one -- well, by all representations Mr. Upham was already in the cell
5 in plain jail clothes and Mr. Enyart, during the break, brought the defendant
6 back to the room. There were also things going on in Judge Cheney's end
7 with multiple people in and Mr. Enyart didn't know what Upham looked like
8 and I think nothing was said to him. After this incident and we had adjourned
9 for the day Officer Enyart -- and, by the way, I've given all the reports that I
10 have on this incident thus far to Mr. Rion as well, not just the video but the
11 reports that many stayed to write last night, but Mr. Carter directly said to him,
12 that he apologized and he knew that was a witness against him and he
13 should have said something. So, at any point Mr. Carter, when he realizes
14 who's in there, because he's walking there uncuffed, could have turned
15 around knowing, knowing all the proceedings that have gone on before and
16 all the discussions about all these inmates that are looking to be transferred
17 here, and the timing of these inmates, and how we're going to bring them
18 from the prison, and security risks, and things of that nature, he knew that
19 was a primary concern and he didn't volunteer that information to prevent it.
20 He's the one that took the first swing. He's the one that created the incident.
21 So, he doesn't get a mistrial due to his own actions, his own choices, I might
22 add.

23 Then, also, he talks about we haven't had any prior incidences with

1 Mr. Carter. Well, he's been in custody since he was indicted. He hasn't been
2 around other witnesses to be able to do anything, quite frankly.

3 But, more importantly, that's really not, despite Mr. Rion's
4 representations and his beliefs, that is not the purpose of this. The purpose is
5 to show a couple of things. First off, consciousness of guilt. He knows what
6 Upham is going to testify to. He has not only Sergeant Smith's reports as to
7 that interview, but he also has Detective Clark's interview of him. It's been a
8 point of contention in various means. My understanding is that a number of
9 his witnesses, these prison witnesses, are there to contradict or, I guess,
10 thrust credibility issues upon Mr. Upham's testimony. So, it wasn't like it was
11 new to him. What happens is he knows that Upham is about to testify in a
12 way that's very damaging to him and he doesn't want him to testify. He
13 attacks him. He's sending a message to him this is what's going to happen to
14 you. That's a consciousness of guilt. Not to mention that it also shows, quite
15 frankly, his modus of operation when he feels someone is doing something
16 wrong to him. Disrespecting him I think was his own language. Disrespecting
17 him. You're going to pay. That's his mode. He's going to physically attack
18 you and he's going to do it when you're not ready for it because he sucker
19 punched Mr. Upham. It's the State's belief that he shot Ken Warrington in the
20 back. Thankfully he didn't have a gun yesterday.

21 So, for those reasons, and particularly the consciousness of guilt, we
22 would ask that the motion be overruled, both motions be overruled.

23 THE COURT: Okay. Again, I'll give Mr.

1 Rion an opportunity, if you want to rebut anything they've argued. Do you
2 have anything else you want to say?

3 MR. RION: You know, the State's last
4 statement was essentially an argument of actions in conformity therewith
5 once again. You know, the statement that allegedly was made by Mr. Carter
6 was 'why are you lying on me'. So, I don't see how it's consciousness of guilt.
7 Nothing further.

8 THE COURT: Okay. All right. This
9 presents kind of a unique situation for the Court, and I'm sure counsel, too. I
10 studied on it because I anticipated there would be these kinds of issues and I
11 reserved making any kind of determination until I heard all of the arguments
12 and, first off, made sure whether or not the State actually intended to use any
13 of the evidence of the incident that occurred. Apparently they do. So, I'm
14 going to deal with this.

15 First off, I think the most important point here would be right now the
16 Motion for Mistrial. So, I'll deal with that first because obviously if I grant a
17 mistrial then everything else is, I suppose, moot at this point. We went over a
18 little bit of this when the prior Motion for a Mistrial was made in terms of how
19 the Court has to exercise its discretion. Again, I've done some research in
20 anticipation of this. I just want to state this as kind of a background of my
21 decision and how I'm exercising my discretion so this is pretty commonly
22 understood. State -vs- Franklin, 62 Ohio State 3d, 118, there's a quote from
23 there that, "Mistrials need to be declared only when the ends of justice so

1 require and a fair trial is no longer possible. A mistrial should not be ordered
2 in a criminal case merely because some error or irregularity has intervened.”
3 It’s also well established that a Court will not permit a party to take advantage
4 of what they call in the case law invited error. Under invited error, under that
5 doctrine, “A party may not take advantage of an alleged error that the party
6 induced.” I would state State, ex. rel. Fowler -vs- Smith at 68 Ohio State 3d,
7 357, Rhodes -vs- Rhodes Industries, 71 Ohio Appellate 3d, 797, Lester -vs-
8 Leuck, L-E-U-C-K, it’s an older case, 142 Ohio State 91, but it’s still cited, “A
9 litigant cannot be permitted either intentionally or unintentionally to induce an
10 error and then procure a reversal of the judgment for an error for which he
11 was actively responsible.” They’ve taken those types of theories into the
12 realm of mistrials and State -vs- James, which is a Clark County appeal case
13 from 1999, Clark County Number 98-CA-54, and it didn’t have a computer
14 website number that I could find, but says, “Courts have been reluctant to
15 consider disruptive conduct of a defendant to be a proper ground for a
16 mistrial.” Now, this disruptive conduct wasn’t in the Courtroom, which many
17 of the cases referred to outbursts in the Courtroom. But, I think the case law
18 and the reasons behind the cases would be the same, especially when
19 there’s an issue of whether or not the disruptive conduct that may have
20 happened in the holding room, well, whether or not that’s going to be
21 presented to the jurors and they would know about it. Also, State -vs-
22 Gonzalez, an Athens appeal case number 97CA52. All these cases pretty
23 much are of the same nature. They hold that, “To allow disruptive conduct

1 or an intentional or unintentional inducement of what might be considered by
2 some to be error, to allow a party to do that as a proper ground for a mistrial
3 would provide a defendant with a convenient device for provoking a mistrial
4 whenever he or she chose to do so." That is the State -vs- James case. It's
5 a 1999 case. That's the Clark County case - State -vs- James. There's
6 cases that say outbursts during voir dire -- well, that's not what we're talking
7 about. But, again, -- well, that's the Gonzalez case from Athens. But, again,
8 the theory, I'm citing this as the theory as can something that the defendant
9 has done be used as a grounds for a mistrial. In State -vs- Greathouse,
10 Montgomery Court of Appeals, the computer website number is
11 2007-Ohio-2136, the defendant violently overturned a defense table and then
12 moved for a mistrial. The Common Pleas Court denied the mistrial. The
13 Court of Appeals affirmed that, again, saying, "A defendant should not be
14 permitted to profit from his voluntary and physical disruptive behavior." Also,
15 in State -vs- Chambers, a 2000 case, and I'm sorry but I don't have the
16 computer website number, it's Court of Appeals number 99 AP-1308, and I
17 have the Westlaw and it's 2000 Westlaw 963890, and it says, "A defendant
18 cannot participate in intentional acts and then seek the protection of the Court
19 from his own misbehavior."

20 Now, I agree with the defense characterization, and based upon all of
21 the information that I have that's been presented that's on the record, it was
22 an accident. It was an unfortunate accident that the defendant and the
23 witness were put in the same holding room. But, what occurred thereafter I

1 find was not an accident. It was intentional based upon the viewing of the
2 video of that. I'm going to find that the defendant cannot participate in an
3 intentional act.

4 So, I'm going to overrule the Motion for a Mistrial under the invited
5 error doctrine.

6 Now, with regard to whether or not I'll permit the evidence of the
7 incident to be presented, again, I'm basing that upon the representations of
8 counsel as to how they intend to use that. The first question I need to make
9 sure is there sufficient evidence that the defendant committed an act? Well,
10 obviously there's the DVD and so I find there is sufficient evidence that he
11 committed an act. So, then the analysis becomes is this a 404 (B) issue or
12 not, or is it a combination of 404 (B) and something other? 404 (B) allows the
13 admission of other acts. This is an other act. If it's related to the crime in
14 question. State -vs- Lowe, 69 Ohio State 3d, 527 and State -vs- Goehring,
15 G-O-E-H-R-I-N-G, 2007-Ohio-5886. Even the Sixth Circuit Federal Court of
16 Appeals in United States -vs- Adams said, "404 (B) is not implicated when the
17 other act evidence is part of a continuing pattern." Necessarily I know that the
18 State is trying, perhaps, to argue that. But, they go into a discussion more
19 about is it intrinsic or extrinsic evidence. If it is intrinsic, i.e. related to the
20 crime, it can be brought in under 404 (B). They basically discuss what
21 intrinsic evidence is and the language that I feel is controlling in this case is,
22 "Intrinsic evidence is, is there a connection to the charged offense."
23 Insomuch as this was a witness in the case who apparently is going to testify

1 against the defendant, I find there is that connection to the offense. Also,
2 Ohio Courts have said, "Evidence, 404 (B) precludes evidence of other acts
3 that are wholly independent of the criminal offense for which the defendant is
4 on trial." I find that what happened yesterday is not wholly independent. This
5 is State -vs- Justice, Franklin County Court of Appeals 89 AP 956 and State
6 -vs- Leonard, Court of Appeals, again, I'm sorry, I don't have the county, but
7 it's CA92-12 and a Westlaw number of 1993 Westlaw 172198. Also, State
8 -vs- Wilkerson, 64 Ohio State 2d, 308, "Evidence of other crimes may be,"
9 and let's insert the words 'other acts', "may be presented when they are so
10 blended or connected with the one on trial as that proof of one incidentally
11 involves the other or explains the circumstances thereof." I think it's that last
12 phrase that would apply in this case - 'explains the circumstances thereof or
13 tends logically to prove any element of the crime charged'. One of the
14 elements, obviously, is a culpable mental state here that has to be proven.
15 So, does what happened yesterday explain the circumstances or logically
16 tend to prove an element of the crimes charged? So, I was drawn to State
17 -vs- Ritchey, 64 Ohio State 3d, 353, State -vs- Leonard, a Lawrence County
18 Appellate Court case number CA92-12, State -vs- Reese from Cuyahoga
19 County, and the number is 53115 and 53116, and State -vs- Soke, S-O-K-E,
20 105 Ohio Appellate 3d, 226. They're all standing for the proposition that,
21 "Evidence of threats or intimidation of witnesses reflects a consciousness of
22 guilt and is admissible as an admission by conduct because intimidation of a
23 witness is not wholly independent of the charged offenses." State -vs-

1 Williams also stands for that. 2008-Ohio-1948.

2 So, I find, first off, that 404 (B) is not implicated. This is intrinsic
3 evidence not wholly independent of the offenses and it is evidence of an
4 admission by conduct reflecting a consciousness of guilt that tends logically to
5 prove an element of the crimes charged. But, even if 404 (B) were
6 implicated, which I don't think it is, but if 404 (B) would be implicated it would
7 be admissible for other purposes other than to prove character or that the
8 defendant acted in conformity with character, such as intent, knowledge,
9 motive, and things that are listed in 404 (B).

10 So, I'm going to allow the State to use the evidence over the defense
11 objection. Exceptions are noted. I've stated my reasons. I will have a
12 consciousness of guilt instruction and that will also be a blended, well, not
13 only a consciousness of guilt, but also to make sure the jurors understand
14 they cannot use the evidence to show the defendant's character or that he
15 acted in conformity with that character in allegedly committing the crimes that
16 are before the Court. But, as the consciousness of guilt instruction in O.J.I. is,
17 well, I'll use that. I will voir dire the jurors to make sure they haven't heard
18 anything about it. I'm going to also order that the State not, in closing
19 argument, not use the 'thankfully he didn't have a gun yesterday' argument
20 that you made in your argument.

21 MRS. KOHLRIESER: Absolutely, your
22 Honor.

23 THE COURT: You won't do that in closing

1 argument in front of the jurors. Okay?

2 MRS. KOHLRIESER: Yes, your Honor.

3 THE COURT: So, I hope you understand
4 my ruling. Exceptions are noted for the record. Anything else that we need to
5 do before the jurors come in?

6 MR. RION: Can we approach, your
7 Honor?

8 THE COURT: Sure.

9 (WHEREUPON, Court and counsel had a brief discussion at the Bench, on
10 the record, as follows.)

11 MR. RION: May I have five minutes with
12 him to discuss the implications of this? Is it possible that we could be back
13 there and I was wondering if his mother could be outside the room, but still in
14 ear shot of us, so I can talk to them about something?

15 MRS. KOHLRIESER: Hanging out in the
16 hallway?

17 MR. RION: No. I'd like her outside, right
18 outside the cell door, just maybe with the food door open or something.

19 MR. MILLER: (Inaudible).

20 MRS. KOHLRIESER: I would just want
21 two deputies out there. That's all.

22 MR. RION: That's fine. I have no
23 problems with that.

1 MRS. KOHLRIESER: One other thing,
2 your Honor. I believe we also need to call Tim Enyart as a potential witness if
3 Jon Paul wants to argue, or, would argue that, you know, due to no fault of his
4 own he was placed in there, well, Tim Enyart would need to testify that he
5 specifically told him after that that he knew that was a witness and he should
6 have said something to him. So, I don't know how we want to handle Tim's
7 presence is my thing.

8 THE COURT: Okay.

9 COURT REPORTER: Wait. I can't hear you.

10 THE COURT: Oh. I pressed the button.
11 That's why. Make the arrangement with his mother as inconspicuously as
12 possible. I mean, maybe just -- well, maybe the media will walk out in the
13 hallway. Just kind of do it quietly. Okay?

14 MR. MILLER: Well, do you want a deputy
15 to take her back there?

16 THE COURT: No. Just take her back.

17 MR. RION: Okay.

18 THE COURT: Just figure something out so
19 it isn't obvious. Okay.

20 (WHEREUPON, Court continued on the record, as follows.)

21 THE COURT: Okay. All right. We're
22 going to take a short recess and then we'll have the jurors back in here.

23 (WHEREUPON, COURT WAS IN RECESS.)

1 THE COURT: All right. Let the record
2 reflect that it's the 17th of September, 2015. We're reconvening in CR2014
3 0139, State of Ohio -vs- Markelus Q. Carter. The record will reflect that the
4 defendant is present in Court with his attorney. The State is present. The
5 jurors have finally been returned to the Courtroom.

6 First and foremost, ladies and gentlemen of the jury, again, I tried as
7 hard as I could to try to estimate or guesstimate where we would be. We
8 weren't there. Again, I appreciate your patience and I ask that you continue
9 to have patience in matters like these, very important cases. There are a lot
10 of things that the Court has to cover. There's a lot of things that I can't do
11 with the jury present - procedure and legal and things like that. Several things
12 had come up. You know, sometimes I can try to plan and I think, okay, if I
13 give them an extra half hour it's going to be good and unfortunately for us
14 today it wasn't. So, again, I appreciate your presence, or, your patience.

15 I want to ask again, as I have asked every morning, has anything
16 happened in your lives? Been exposed to anything? Talked to anybody?
17 Heard anything? Rumors? Media? Anything about the case - anybody -
18 that's going to prevent you from being fair and impartial and continuing to
19 serve as a juror in this case? Anyone? Anything come up in anyone's lives?
20 Sickness? Problems? Anything like that? Everybody's good? Okay.

21 I'll just ask a little bit more, too, because we did have an early break
22 yesterday, did anybody hear any rumors or accounts, whether they were in
23 the media or not, about things that happened after or while we were in

1 recess yesterday? Anybody? Okay. The jury has indicated not. So, we will
2 continue. We are in the State's case. The State may call their next witness.

3 MR. MILLER: Stephen Upham.

4 WHEREUPON, called to appear as a witness in this proceeding was one:

5 **STEPHEN UPHAM**

6 who, having been duly sworn by the bailiff herein, testified as follows:

7 BAILIFF: He has an objection.

8 THE COURT: Okay. This witness has
9 indicated, as is his right, not to be photographed or videotaped. Under
10 Superintendence Rule 12 I would order the media not to videotape or print his
11 photograph in the media. Go ahead.

12 **DIRECT EXAMINATION**

13 **BY MR. MILLER:**

14 Q Mr. Upham, can you state your full name for the record, please?

15 A Stephen T. Upham.

16 Q Is it pronounced Upham or Upham (pronunciation)?

17 A Upham.

18 Q Upham?

19 A Yes.

20 Q Okay.

21 THE COURT: Get close to the
22 microphone.

23 Q Stephen, I'm going to ask you, and we've had to do this with a

1 number of witnesses because what the witnesses don't realize is that this
2 records everything that's being said in here, but it also amplifies your voice so
3 that everybody can hear. Okay?

4 A Okay.

5 Q So, I'm going to ask you those questions again that I just asked you so
6 that everybody can hear your answers. Okay?

7 A Yes.

8 Q I'm going to ask you to state your full name for the record.

9 A Stephen T. Upham.

10 Q Okay. And then I asked if it was Upham instead of Upham
11 (pronunciation) because I pronounced it Upham.

12 A It's Upham.

13 Q Upham? Okay. Mr. Upham, are you in prison?

14 A Yes, sir.

15 Q And where are you in prison at?

16 A Oakwood.

17 Q Okay. Is that part of, if you know, is that part of the Allen County
18 prison system here in Lima?

19 A Yes.

20 Q Okay. What are you in prison for?

21 A Attempted Murder.

22 Q Okay. And is this your first stint in prison?

23 A No.

1 Q How many other -- if I say how many numbers, do you know what I'm
2 talking about?

3 A Yes.

4 Q What am I talking about if I ask you how many numbers do you have?

5 A How many prison sentences I've served.

6 Q Okay. I'm going to ask you to speak up real loud; okay?

7 A Okay.

8 Q How many numbers do you have? Well, actually, what does numbers
9 mean?

10 A How many prison sentences I've served.

11 Q Okay. So, how many numbers have you had?

12 A Three.

13 Q Okay. Is this your third that you're serving now?

14 A Yes.

15 Q And how many years are you serving for this Attempted Murder?

16 A Thirteen.

17 Q Okay. What was your former prison stints for?

18 A The first one was for Attempted Trafficking in LSD with a Sex Battery
19 and the second one was Attempted Trafficking in Marijuana.

20 Q Okay. And are all of those in Ohio?

21 A No.

22 Q What other state?

23 A Michigan.

1 Q Michigan?

2 A Yes.

3 Q And you say you have three numbers, so to speak, or three stints in
4 prison. How many in Ohio and how many in Michigan?

5 A Two in Ohio and one in Michigan.

6 Q So, this would be your second in Ohio?

7 A Yes.

8 Q Let's talk about the one you're currently serving. When did you go in?

9 A April 26th of '11.

10 Q Okay. And when is your out date?

11 A 1-19 of '24.

12 Q Okay. That's 2024?

13 A Yes.

14 Q Now, you're here to testify for the State.

15 A Yes.

16 Q Correct? Has anyone promised you anything, absolutely --

17 A No.

18 Q Okay. Again, witnesses don't generally do this and they'll try to
19 anticipate my question and answer. That makes it difficult for Sue here to
20 transcribe what's recorded. So, I'm going to ask that you just wait until I finish
21 my question and then answer; okay?

22 A Okay.

23 Q Has anyone promised you anything in exchange for your testimony

1 here today?

2 A No.

3 Q Okay. Now, do you know an individual named Markelus Carter?

4 A Yes.

5 Q Do you see him in the Courtroom today?

6 A Yes, I do.

7 Q Can you please indicate where he's sitting?

8 MR. MILLER: For the record, he's
9 indicating to Mr. Upham's left. I would just ask the record to reflect he's
10 identified the witness - I'm sorry - the defendant.

11 THE COURT: Okay. So noted.

12 MR. MILLER: Thank you.

13 Q How do you know Mr. Carter?

14 A I met Carter when I arrived at A.C.I. somewhere after 9-16 of '11 when
15 I got to A.C.I.

16 Q Okay. Now, just for clarification, because many folks don't know, when
17 you say A.C.I. do you include in that term A.C.I. Oakwood?

18 A Yes.

19 Q Okay. Okay. So, we can use that term Oakwood and A.C.I.
20 interchangeably if we choose to during this and you'll understand what
21 everybody's talking about?

22 A Yes.

23 Q Okay. How did you meet him?

1 A He was on the same block as I was on.

2 Q Okay. Now, how would you describe your relationship with Mr. Carter
3 upon your arrival in prison here at A.C.I.?

4 A Just pretty much asking questions to him.

5 Q Okay.

6 A You know, he's quiet.

7 Q Okay.

8 A But, he knew something about the law is what I was told and so I
9 asked him some questions.

10 Q Okay.

11 A Concerning my case.

12 Q Okay. Was he helpful to you?

13 A No.

14 Q Okay. But, nonetheless, you asked him questions about the law?

15 A I asked a lot of people questions about it.

16 Q Understood. Now, during these conversations did Mr. Carter ever
17 speak to you about a homicide?

18 A He told me he shot somebody.

19 Q Okay. Did he tell you who he shot?

20 A No.

21 Q Okay. Did he tell you any other facts about that particular homicide?

22 A He told me there was an argument between his babies' momma and
23 him and a boyfriend got mad and threatened his kids and a couple of weeks

1 later he shot him.

2 Q Okay. Did anything strike you funny about his statement about the
3 boyfriend threatening his kids?

4 A Yea.

5 Q Yea? What struck you as odd about that?

6 A Because if a person threatens your kids you're going to shoot him right
7 then if you take it --

8 Q Well, I take from your answer, then, a follow-up question and that is,
9 did Mr. Carter say anything about how the shooting took place?

10 A He said after the argument he watched him for, like, a couple of weeks,
11 standing outside watching him come and go.

12 Q Okay. Did he say anything about what he wore - and when I say 'he' I
13 mean Mr. Carter -- well, let me rephrase the question and not use so many
14 pronouns. Did Mr. Carter say anything about what Mr. Carter wore when he
15 shot this guy?

16 A Yea.

17 Q What did he say?

18 A He said that he was wearing camouflage and a paintball mask.

19 Q Okay. How many conversations did you have with Mr. Carter about
20 this topic?

21 A Quite a few.

22 Q Did you know Mr. Carter prior to your arrival at A.C.I./Oakwood?

23 A No.

1 Q Do you know anything about Mr. Carter's life outside of prison?

2 A No.

3 Q Now, at some point when you -- let me strike that. Did you approach
4 somebody who worked at the prison with this information at some point?

5 A Yea.

6 Q Okay. Who did you approach?

7 A Sergeant Smith.

8 Q And did you tell Sergeant Smith this information?

9 A Yes.

10 Q Did Sergeant Smith promise you anything whatsoever in exchange for
11 this information?

12 A No.

13 Q Did you go to Sergeant Smith right away with this information?

14 A No.

15 Q How long after learning this information -- well, let me ask you this.

16 How did you -- you went to Sergeant Smith. Did you know Sergeant Smith
17 wanted to know some information about Mr. Carter?

18 A Yes.

19 Q How did you -- how did you learn that Sergeant Smith wanted to know
20 information about Mr. Carter?

21 A Another inmate.

22 Q Okay. How did that come about? How did you learn that?

23 A Tom Smith had, I guess, been called to his office. He came out and

1 he told me.

2 Q So, Tom Smith is another inmate?

3 A Yes.

4 Q And he was called to Sergeant Smith's office?

5 A Yes.

6 Q And then who came out and told you what?

7 A Tom.

8 Q Tom came out and told you what?

9 A Basically, "You're not going to believe this, but they're investigating his
10 shooting."

11 Q Okay. That's all he said to you?

12 A I believe so.

13 Q Okay. Then that's when you went to Sergeant Smith?

14 A No, I didn't go right away.

15 Q You didn't? How long did it take you?

16 A It took me -- it took me a little while.

17 Q Why did it take you a little while?

18 A It's kind of like a code. You don't tell on people; you know? That's
19 how I've lived my life.

20 Q So, you just decided to go?

21 A I just decided to go. I started thinking, you know, about the people
22 that, you know, are left behind and just one thing led to another and I figured I
23 would step up and offer help.

1 Q Again, were you seeking anything in return for this information?

2 A No.

3 MR. MILLER: Can I have one second,
4 your Honor?

5 THE COURT: Sure.

6 MR. MILLER: Thank you.

7 (WHEREUPON, Court went off the record briefly.)

8 Q Okay. Now, Mr. Upham, were you prepared to come in and testify
9 yesterday?

10 A Yes.

11 Q Okay. Did something happen just prior to you coming in and
12 testifying?

13 A Yes.

14 Q Can you tell the jury what happened just prior to coming in and
15 testifying yesterday?

16 A I was assaulted.

17 Q Who were you assaulted by?

18 A Carter.

19 Q Okay. The same person you've identified here in the --

20 A Yes.

21 Q Okay. Now, where were you when you were assaulted?

22 A In the holding cell.

23 Q Okay. I know you don't, well, you don't know this building very well,

1 I suppose. Let me ask it this way - when you were assaulted was it your
2 impression that you were getting just ready to come in and testify?

3 A Yes.

4 Q Tell us what happened when you were assaulted.

5 A I was sitting in the -- I was standing in the holding cell. They brung
6 (sic) Carter into the same holding cell I was in.

7 Q Okay.

8 A They uncuffed him and brung (sic) him in and shut the door. He
9 walked up to me and goes, "Why are you lying on me? Why are you
10 testifying on me?"

11 Q Uh-huh. Then what happened?

12 A He threw a punch.

13 Q Okay. Then what happened?

14 A We had an altercation.

15 Q Okay.

16 A This thing sucks.

17 Q Yea. It's kind of awkward.

18 THE COURT: Don't worry about it. It does
19 have some weird back feed.

20 A Yea.

21 Q Yea, it has some feedback when you talk right into it. Like if I do this,
22 you get a lot of stuff coming back at you.

23 A We had an altercation. After he swung I tried to put him in a headlock

1 and wait. I figured somebody would come in.

2 Q Okay. Did they come in?

3 A It took them a minute.

4 Q Okay.

5 A About forty seconds or so.

6 Q All right. So, --

7 A He put his finger in my eye.

8 Q Can you describe the position you were in when -- well, you know the
9 term C.O.?

10 A Yea.

11 Q What does C.O. mean?

12 A Corrections officer.

13 Q Okay. So, can you describe the position you were in when the C.O.'s
14 came in?

15 A I was in -- when the C.O.'s came in my arm was turned. He had ahold
16 of my tricep.

17 Q With what?

18 A His mouth.

19 Q Okay. Was he behind you?

20 A On the side of me more.

21 Q Okay.

22 A Wrenching my arm back.

23 Q Okay.

1 A So, I guess maybe behind me a little.

2 Q And how were you?

3 A I was facing a little wall about this big.

4 Q Okay. I didn't quite hear that.

5 A I was facing a wall about this big and he had my arm back like this.

6 Q Okay. All right.

7 A His finger was in my eye.

8 Q Yea. Do you have an injury to your eye?

9 A Yes.

10 Q Okay. Do you have an injury to your arm?

11 A Yes.

12 Q What is that?

13 A Thirty-two of his teeth.

14 Q Okay. Do you have any other injuries?

15 A A lump to the back of my head.

16 Q Okay.

17 MR. MILLER: Could I have one second,
18 your Honor?

19 THE COURT: Yes.

20 MR. MILLER: Thank you.

21 (WHEREUPON, Court went off the record briefly.)

22 Q Mr. Upham, after the C.O.'s -- well, I guess I should ask, did the C.O.'s
23 eventually come?

1 A Yes.

2 Q Okay. And did the C.O.'s break up this altercation?

3 A Yes.

4 Q Okay. And where did they take you, if they took you anywhere?

5 A They took me out of there and gave me medical treatment.

6 Q Okay. Did you then give a statement to Sheriff's Deputies?

7 A Yes.

8 Q Okay. As part of that statement that you gave were there pictures
9 taken?

10 A Yes.

11 Q Have you had an opportunity to see those pictures yet?

12 A Yes.

13 Q Okay. I'm going to hand you those pictures here in just one second, as
14 soon as we get them marked as an exhibit. Okay? I'm going to ask you one
15 or two questions about them; okay?

16 A All right.

17 MR. MILLER: Sorry, your Honor. We'll do
18 this as quickly as we can.

19 MR. RION: Your Honor, we just have a
20 continuing objection.

21 THE COURT: Okay. That will be noted.

22 MR. MILLER: Can I approach the witness,
23 your Honor?

1 THE COURT: Yes.

2 Q All right. I'll step right up here beside you so I can project my voice
3 over that microphone. Mr. Upham, I'm going to present you with what has
4 been marked as State's exhibit --

5 MRS. KOHLRIESER: They start at '174',
6 Tony.

7 MR. MILLER: And go to?

8 MRS. KOHLRIESER: '181' (sic).

9 Q I'll hand you what has been marked as State's exhibits '174' through
10 '180'.

11 THE COURT: Okay. Let me just ask - is
12 there a '173'?

13 MRS. KOHLRIESER: There is, your
14 Honor. It's the video.

15 THE COURT: Okay. All right. It just
16 jumped a number. Okay. Go ahead. '174' through --

17 MR. MILLER: '180'.

18 THE COURT: '180'. Okay.

19 Q Mr. Upham, I'm going to hand you these photographs and I'm going to
20 ask you to take a quick look at them. When you're done looking at them I'd
21 just ask you to tell me when you're done.

22 (WHEREUPON, witness reviewed exhibits.)

23 A Done.

1 Q Do those truly and accurately depict the injuries you suffered during
2 the altercation you've described here during your testimony?

3 A Yes.

4 Q And, again, can you just describe those injuries?

5 A My eye.

6 Q Uh-huh. Where else?

7 A My nose.

8 Q Okay.

9 A My tricep, left tricep.

10 Q Okay.

11 A And the back of my head.

12 Q Let's do it the old-fashioned way. Mr. Upham, I'm going to hand you
13 what's been marked as State's exhibit '176'. Do you see that?

14 A Yes.

15 Q What are we looking at there?

16 A A bite mark to my left tricep.

17 Q Speak right into the microphone.

18 A A bite mark to my left tricep.

19 Q State's exhibit '177'. What are we looking at there?

20 A A finger gouge to my left eye.

21 Q State's exhibit '178'. What are we looking at there?

22 A Same.

23 Q Same?

1 A Eye.

2 Q State's exhibit '179'?

3 A Eye.

4 Q State's exhibit '180'?

5 A Scratch to the back of my head.

6 Q State's exhibit '181'?

7 A Lump to the back of my head.

8 Q Okay.

9 MRS. KOHLRIESER: Mr. Miller, it's
10 working now if you want to use it.

11 Q State's exhibit '174'. Who's that?

12 A Me.

13 Q That's you?

14 A Yes.

15 Q And State's exhibit '175'?

16 A Me with a mark to my left tricep.

17 MR. MILLER: One second, your Honor?

18 THE COURT: Uh-huh.

19 (WHEREUPON, Court went off the record briefly.)

20 Q I don't think I had the opportunity to put these particular pictures up on
21 the screen. I'll do that quickly here. State's exhibit '176'?

22 A Bite marks to the left tricep.

23 Q Okay. State's exhibit '177'?

1 A Left eye.

2 Q Injury?

3 A Injury.

4 Q State's exhibit '179'?

5 A Left eye injury.

6 Q State's exhibit '180'?

7 A Scratch to the back of my head/neck.

8 Q State's exhibit '181'?

9 A Lump to the back of my head.

10 Q All these injuries you've just described and that have been shown to
11 the jury, were those suffered during the altercation you've described?

12 A Yes, sir.

13 Q Mr. Upham, or Upham, sorry, --

14 A That's all right.

15 Q Do you know whether or not this altercation was videotaped?

16 A Yes.

17 Q Have you had an opportunity to look at that videotape?

18 A Yes, I have.

19 MR. MILLER: Your Honor, at this point I'm
20 going to play State's exhibit '173'.

21 THE COURT: All right. There is a
22 continuing objection; right, Mr. Rion?

23 MR. RION: Yes, your Honor.

1 THE COURT: Okay. So noted.

2 Q Now, in the videotape you've seen was there any audio?

3 A No.

4 Q By the way, did Mr. Carter say anything to you while this altercation
5 was going on?

6 A Yes.

7 Q What did he say?

8 A He asked why I was testifying against him; why I was lying on him.

9 Q And anything after that?

10 A Yes. He told me I wasn't going to testify against him.

11 Q Okay.

12 MR. MILLER: Your Honor, I'm going to
13 ask for the Court's indulgence for a second. This video has proprietary
14 software and it takes a second to open it up and get to where we need. So, I
15 apologize ahead of time. There's nothing I can do about that.

16 THE COURT: Does it work on your
17 laptop?

18 MR. MILLER: Yes, I've played it on the
19 laptop. It's just the software.

20 MRS. KOHLRIESER: Your Honor, we're
21 going to actually seek some assistance from an I.T. person.

22 THE COURT: Anything you can do to get
23 it going quicker - I'll let you do it.

1 MRS. KOHLRIESER: We're getting closer.

2 Q Mr. Upham?

3 A Yes.

4 Q I'm going to ask you to watch this videotape; okay?

5 (WHEREUPON, State's exhibit '173' was played in open Court.)

6 Q Mr. Upham, does that video truly and accurately depict the altercation
7 you've described here today with Mr. Carter?

8 A Yes.

9 Q Now, there was a moment in that video, and I'm just going to
10 demonstrate, and I hope the microphone picks it up, where you are bent over
11 and your left arm is behind you.

12 A Yes.

13 Q Is that when you suffered that bite mark to your left tricep?

14 A Yes.

15 MR. MILLER: One second, your Honor.

16 THE COURT: Okay.

17 (WHEREUPON, Court went off the record briefly.)

18 Q Mr. Upham, when the guards came did you know they were at the
19 door? Could you hear them? I don't want to ask a compound question.
20 Could you hear the guards coming?

21 A Yes.

22 Q Okay. Did you know when they were at the door?

23 A Yea. They were fumbling with their keys.

1 Q They were what? I'm sorry.

2 A Fumbling with their keys.

3 Q Okay.

4 A Trying to open the door.

5 Q They were trying to open the door?

6 A Yes.

7 Q And is that when -- well, is that when Mr. Carter stopped biting your
8 arm?

9 A Yes.

10 Q Now, Mr. Upham, just one last time. State's exhibit '173', I don't think
11 when I asked you the first time that I referenced the exhibit, which is the video
12 that you just watched. Does that truly and accurately depict the altercation
13 that you've described in your testimony between you and Mr. Carter?

14 A Yes.

15 MR. MILLER: One second, your Honor.

16 (WHEREUPON, Court went off the record briefly.)

17 MR. MILLER: I have no further questions,
18 your Honor.

19 THE COURT: Okay. Mr. Rion, questions?

20 **CROSS EXAMINATION**

21 **BY MR. RION:**

22 Q Sir, let's start with yesterday first.

23 A Sure.

1 Q It was a mistake that they put Carter in a cell with you; correct?

2 A I guess.

3 Q For security reasons that shouldn't happen; right?

4 A Correct.

5 Q When they put him in the cell you didn't tell the officers, 'hey, wait a
6 minute, that's Carter'?

7 A No.

8 Q You didn't tell them that you were going to come in and testify in an
9 Aggravated Murder case against this person, and that you were coming up to
10 do that; did you?

11 A No.

12 Q You waited for him to come into the cell and for them to close the door
13 and then you said something to him; didn't you?

14 A After he said something to me; yes.

15 Q No. Well, you started -- you were interviewed just yesterday about
16 this; right?

17 A Yes.

18 Q Didn't you say to them that as soon as he walked into the room and
19 they closed the door and they locked it and after the officer was out of earshot
20 didn't you say something like, 'how's your case going, Carter'?

21 A Yes, actually I did. I said, "How's your trial going?"

22 Q Yes. Knowing that you were about to come in and testify against him
23 in an Aggravated Murder case you started with that; correct?

1 A I was in shock. I mean, --

2 Q And now his response to you at that point was, "Why are you lying on
3 me?"

4 A Correct.

5 Q It wasn't -- the statement you gave yesterday to the officers wasn't
6 'why are you testifying against me'. It was 'why are you lying on me'. That
7 was the statement; correct?

8 A That was the first one.

9 Q That's what you told the officers yesterday.

10 A Yes. That was the first one.

11 Q You didn't tell the officers any other statements about that; correct? I
12 can show you -- well, I guess it's not your statement. You talked to Officer
13 Lauck yesterday; right?

14 A I talked to a few.

15 Q Uh-huh. After saying 'why are you lying on me', he sort of put his
16 hands up like this; right? "Why are you lying on me?"

17 A I believe so.

18 Q And you're sitting down at that time when he's asking you that
19 question; right?

20 A Yes, I believe so.

21 Q And at that point you start to stand up and move towards him; didn't
22 you? It's on the video.

23 A I believe I just stood up.

1 Q And moved in his direction? Stood up in his direction?

2 A I don't believe so.

3 Q And then the jury saw what the jury saw. You were punching Mr.

4 Carter as well; correct?

5 A Correct.

6 Q Now, you're serving a thirteen year sentence; right?

7 A Yes.

8 Q For Conspiracy, or, Complicity to Commit Attempted Murder?

9 A Correct.

10 Q And there's a gun specification on that?

11 A Yes, there is.

12 Q Because a lady was shot in the head?

13 A Correct.

14 MR. MILLER: Objection.

15 MRS. KOHLRIESER: Objection.

16 THE COURT: Sustained. The jury will be
17 instructed to disregard that question and answer.

18 Q The gun -- the point of it was the gun spec. carries a three year
19 mandatory; correct?

20 A Correct.

21 Q And that three year mandatory sentence means you can't get
22 something called judicial release as long as there's a three year mandatory;
23 right?

1 A As far as I know I can't get judicial release at all.

2 Q Okay. You've looked over your case a lot; have you not?

3 A I've tried.

4 Q I'll hand you what's been marked Defendant's exhibit 'II'. Does that
5 appear to be a Judgment Entry of Conviction?

6 A It appears to be.

7 Q And does it indicate on the bottom of the first page that you have a
8 thirteen year sentence and only three years of that is mandatory?

9 A Correct.

10 Q Now, back in 2014 you were in prison; correct?

11 A Correct.

12 Q You went to prison in 2011?

13 A Correct.

14 Q You were convicted in April of 2011, but you didn't go to prison in April;
15 did you?

16 A I believe I got to C.R.C. the 26th of April.

17 Q Wasn't it in September when you actually went to prison?

18 A No.

19 Q Have you ever testified before in any other case?

20 A No.

21 Q Now, when you went to prison you knew a person by the name of
22 Thomas Smith; correct?

23 A Correct.

1 Q In February of 2014 you saw Thomas Smith come out of a room with
2 Sergeant Smith; correct?

3 A He came up to the table where I was at.

4 Q And you talked to Thomas Smith?

5 A He talked to me and I talked back; yea.

6 Q Uh-huh. You asked him, 'why is it that you were in talking to Sergeant
7 Smith'?

8 A No. He came out to me and told me why he was in with Sergeant
9 Smith.

10 Q Uh-huh. Did he tell you that Sergeant Smith was investigating a
11 murder case as it related to Markelus Carter?

12 A Yes.

13 Q You were asked -- do you deny telling Thomas Smith, did you ask
14 Thomas Smith, 'what did you say'? Did you ask him that?

15 A Yea. I asked him what was going on.

16 Q Uh-huh. Did you ask Thomas Smith whether or not Sergeant Smith
17 offered him anything to get out if he could give any information?

18 A He said something towards if he went forward he could possibly get
19 judicial release. He did say that.

20 Q And at that point did you tell Thomas Smith -- well, Thomas Smith said,
21 'I'm not giving any information; I'm not talking on Carter'; right?

22 A No. He didn't say that.

23 Q Okay. Then did you say at that point, and I assume you're going to

1 deny this, but did you say, --

2 MR. MILLER: Objection. Objection.

3 THE COURT: Okay. All right. I'll sustain
4 it.

5 MR. RION: Okay. I'll withdraw it.

6 Q Did you say this to him, 'I would have told him anything that they
7 wanted to know to get some time knocked off'? Do you admit or deny making
8 that statement?

9 A I didn't make that statement.

10 Q Uh-huh. Now, this was in early February of 2014; correct?

11 A I'm not sure if it was February or March. It was sometime after
12 January.

13 Q And then some two weeks go by before you actually go in and talk to
14 Sergeant Smith; correct?

15 A No. I went in that day.

16 Q The same day?

17 A About an hour or two afterwards.

18 Q Okay. So, your testimony is one to two hours after you spoke to
19 Thomas Smith that you went in and spoke with Sergeant Smith?

20 A Correct.

21 Q Okay. So, you wouldn't have time then, according to your testimony,
22 to get information about Markelus Carter; correct?

23 A I already had --

1 Q Just answer my question, sir. You wouldn't have time to gain
2 additional information about Markelus Carter; correct?

3 A I mean, -- no.

4 Q Okay. Now, did you spend those next two weeks from early February
5 till mid-February, well, did you ask Thomas Smith, did you say questions like,
6 and I'm going to use the words, and excuse my language, did you use the
7 words like, 'well, that's fucked up what they're trying to do to Carter'. This is
8 in a question that you would have asked to Thomas Smith - 'did they offer you
9 any deals yet'? Did you make that statement?

10 A I don't recall that.

11 Q Did you ask him, 'if he did do it I wonder how he did it or if there are
12 any facts about how he did it'? Were you trying to get information from
13 Thomas Smith?

14 A No.

15 Q Did you ask questions about a lake? 'I wonder if he put something in
16 the lake'?

17 A A lake? No.

18 Q A lake. 'Could he have destroyed the evidence somehow'? Were you
19 asking these questions of Thomas Smith?

20 A No.

21 Q You deny that. Did you ask him, 'Have you heard anything on Carter?
22 Any more information'? Did you keep going back to Thomas Smith and
23 asking for information, trying to get information from him?

1 A I didn't keep coming back to him.

2 Q I see.

3 A We played video games together. That's about it.

4 Q Now, Thomas Smith used to speak to Markelus Carter; right?

5 A He used to be his cellie.

6 Q Right. Now, was there a time -- do you know a guy by the name of
7 Abdul Bari?

8 A Yea. He was two cells from me the other way. He actually did a paper
9 to my attorney for me.

10 Q Did you and Abdul Bari have what they call a store?

11 A Yes.

12 Q So, you and he, for a period of time, were selling things and doing
13 different types of deals there in the prison? Correct?

14 A I held his store for him.

15 Q Uh-huh. Which means that you have various forms of contraband,
16 whether it's cigarettes or other things?

17 A Commissary - sweets, food.

18 Q Nothing illegal?

19 A No.

20 Q Were the two of you watching a PBS show one day? Were you
21 watching T.V. with him one day and it was a show about, well, a show that
22 dealt with the ability for people to order in information, for inmates to order in
23 police reports and other information in people's cases and then the people

1 in prison were using that to then try to get their sentence lessened by acting
2 like they had information? Do you recall that?

3 A No.

4 Q You don't recall that. Do you recall telling him while you were watching
5 that show, 'I'll do anything to get out of here'?

6 A No.

7 Q You don't recall that. So, you didn't -- since it was just commissary
8 materials you didn't have any type of narcotics or drugs in the institution?

9 A No.

10 Q You didn't use drugs or narcotics in the institution?

11 A No.

12 Q Do you know a guy by the name of Vincent Cunningham?

13 A Yes. He was my cellie for a couple of weeks, maybe a month.

14 Q Uh-huh. Do you ever get letters from your mother?

15 A Yea. I got a card. I got a birthday card probably around the time he
16 was my cellie.

17 Q Uh-huh. And in that birthday card was there a newspaper article about
18 Markelus Carter's case?

19 A No.

20 Q Was there a newspaper article about a murder case?

21 A No.

22 Q Did you show an article to Vincent Cunningham dealing with a murder
23 case?

1 A No.

2 Q Do you know a Chaston Scott?

3 A Yes.

4 Q How do you know Chaston Scott?

5 A He was my cellie before Cunningham.

6 Q And you also knew Chaston Scott from in Toledo; correct?

7 A No.

8 Q Lucas County?

9 A I don't ever recall meeting him there.

10 Q Okay. Do you know that he knew Valenzo Ozley?

11 A I thought Cunningham knew him. I don't think Scott knew him.

12 Q And did you tell Chaston Scott that you and another inmate had come
13 up with this scheme where they were going to have information on your case
14 and you were going to have information on their case and each of you at
15 different times were going to go to different prosecutors to try to make it
16 appear as if you were cooperating to get your sentences reduced?

17 A No.

18 Q That didn't happen, either? You didn't spend a lot of time with
19 Markelus Carter in prison; did you?

20 A Not a whole bunch.

21 Q No. He wouldn't be like one of your friends that you had there, like you
22 had other friends; right?

23 A I didn't mind him. I really didn't have any friends. I just talked to

1 people that would listen to me.

2 Q Uh-huh. And it's your testimony today that within an hour or two of
3 Thomas Smith speaking with Sergeant Smith that you then went to speak to
4 Sergeant Smith? That's your testimony?

5 A Yea. I believe that to be correct.

6 Q And when Thomas Smith came out from speaking with Sergeant Smith
7 he told you that now Sergeant Smith was looking for information in a murder
8 case?

9 A That sounds about right.

10 Q And you're telling me that the testimony was that there was a direct --
11 well, okay.

12 MR. RION: Nothing further.

13 THE COURT: Any redirect?

14 MR. MILLER: Yes, your Honor, just a few
15 questions.

16 **REDIRECT EXAMINATION**

17 **BY MR. MILLER:**

18 Q Mr. Upham?

19 A Yes.

20 Q Yesterday, I'll take you back to yesterday before this altercation, were
21 you surprised to see Mr. Carter at the door?

22 A To say the least.

23 Q That does not generally happen, does it, in these situations?

1 A As far as I know; no.

2 Q Okay. But, it was a surprise to you?

3 A I was shocked.

4 Q Okay. Did Mr. Carter say at that time to any C.O., 'I really shouldn't go
5 in there', or anything like that?

6 A No.

7 Q No? And where was the C.O. when the altercation began?

8 A Back here, I guess.

9 Q Did he leave the door?

10 A Yea.

11 Q How soon after he left the door did the altercation begin? I mean, the
12 physical altercation.

13 A Probably twenty seconds.

14 Q Okay. Now, you testified that you said to Mr. Carter, 'how's the trial
15 going'.

16 A Yes.

17 Q Why did you say that?

18 A Shocked.

19 Q Now, Mr. Rion, and it doesn't show up well on the record, but he used
20 kind of an inflection in his voice that was kind of, well, it's not going to show
21 up on the record, but it was kind of --

22 MR. RION: I'm going to object to his
23 commentary.

1 THE COURT: I'm going to sustain it. The
2 jury can hear what they heard.

3 Q Okay. Okay. Mr. Upham, you heard the inflection that Mr. Rion used
4 when he asked you if you said 'how's the trial going'. Did you hear how Mr.
5 Rion said that?

6 A He just said it.

7 Q Okay. Did he accurately -- did he accurately say it? Did he say it the
8 same way you said it?

9 A I probably said it just the way I'm talking now - calm, shocked. I mean,
10 just --

11 Q Okay. Just how you're talking now?

12 A Yea.

13 Q The video does show you standing up after you were seated. Why did
14 you stand up?

15 A Just had that feeling it was coming.

16 Q That what was coming?

17 A Altercation.

18 Q Okay. Mr. Rion went through a number of cases that you've had.

19 A Yea.

20 Q Were any of those cases here in Allen County?

21 A No.

22 Q Let's go back. How exactly did you and Mr. Carter come to talk about
23 this case while you were in prison? Can you tell me in a little more detail

1 about how that conversation came about?

2 MR. RION: I'm going to object, your

3 Honor. It's beyond the scope.

4 THE COURT: I'll overrule the objection.

5 Go ahead.

6 Q Go ahead and answer.

7 A I was trying to study about my case. Becoming a lawyer is not easy. I
8 read some books and found some things that might help. I asked a lot of
9 people, you know, 'would this help me', 'could this help me'. Then one thing
10 led to another and I told him everything about my case, the shooting,
11 everything, everything how everything happened.

12 Q Okay. Is that how the conversation began between you and Mr. Carter
13 about this case?

14 A Yea.

15 Q Okay.

16 MR. MILLER: One second, your Honor.

17 (WHEREUPON, Court went off the record briefly.)

18 MR. MILLER: I have no further questions.

19 THE COURT: Any recross?

20 MR. RION: Nothing further.

21 THE COURT: Okay. This witness is
22 excused then. It's almost eleven-thirty. Does the State have a witness?

23 MRS. KOHLRIESER: Actually, your

1 Honor, we need to approach just a moment, please.

2 THE COURT: Okay.

3 MRS. KOHLRIESER: Oh, the witness is
4 still excused. Right? Correct?

5 THE COURT: Yea. The witness is
6 excused.

7 (WHEREUPON, Court and counsel had a brief discussion at the Bench, on
8 the record, as follows.)

9 MRS. KOHLRIESER: I mentioned this
10 before about wanting to call Tim Enyart.

11 THE COURT: I've got a problem with that.

12 MRS. KOHLRIESER: (Inaudible).

13 THE COURT: Well, if you knew you were
14 going to use him --

15 COURT REPORTER: I can't hear you.

16 MRS. KOHLRIESER: I specifically told
17 you that.

18 MR. MILLER: (Inaudible).

19 MRS. KOHLRIESER: (Inaudible).

20 THE COURT: Okay. Well, do you have
21 another witness?

22 MRS. KOHLRIESER: Pardon?

23 THE COURT: Do you have another

1 witness?

2 MRS. KOHLRIESER: Scott Leland.

3 THE COURT: Who?

4 MRS. KOHLRIESER: Scott Leland.

5 THE COURT: Oh. Okay. All right.

6 (WHEREUPON, Court continued on the record, as follows.)

7 THE COURT: We're going to break for
8 lunch. Remember the admonitions I've been giving you all along. Don't
9 discuss the case. Don't listen to, pay attention, or read any media accounts.
10 Don't discuss the case with anyone you come in contact with. Don't have any
11 contact with the participants in the case. Don't express or formulate any
12 opinions.

13 I did also want to instruct you now after that last witness. Testimony
14 had been admitted indicating that the defendant was involved in a physical
15 altercation with a witness. You are instructed that defendant's conduct alone
16 does not raise a presumption of guilt. But, it may tend to indicate the
17 defendant's consciousness or awareness of guilt. If you find that the facts do
18 not support that the defendant's conduct, or if you find that some other motive
19 prompted the defendant's conduct, or if you are unable to decide what the
20 defendant's motivation was, then you should not consider this evidence for
21 any purpose. However, if you find that the facts support that the defendant
22 engaged in such conduct and if you decide that the defendant was motivated
23 by a consciousness or awareness of guilt you may, but are not required to,

1 consider that evidence in deciding whether the defendant is guilty of the
2 crimes charged in this case. You alone will determine what weight, if any, to
3 give to this evidence.

4 Also, as has been the case before, there was evidence from this
5 witness that the defendant had been incarcerated in the past. You're not to
6 use the fact that he was incarcerated to show his character or that he acted in
7 conformity with that character as it relates to the allegations in this case.
8 However, that evidence can be used for a limited purpose to show the identity
9 of who the witness was talking to.

10 So, with that, we'll excuse you folks for lunch. This is the problem I've
11 got. Let's just go ahead and have you back at twelve-thirty and I'll make other
12 arrangements for some other docket I have. I don't want to impose upon you
13 folks' time anymore. So, twelve-thirty. Okay? The jury will be excused.
14 (WHEREPON, JURY WAS EXCUSED FOR LUNCH RECESS.)

15 THE COURT: Now that the jurors are
16 excused let's put out on the record in a better way because our sound system
17 is such that these Bench conferences are very cumbersome, an issue arose
18 as to the State may be calling a witness who has been in the Courtroom.
19 Mrs. Kohlrieser?

20 MRS. KOHLRIESER: Yes, your Honor.
21 Obviously prior to yesterday's events the State had no intention whatsoever
22 of calling Deputy Enyart to the stand. He's been nothing but security in this
23 case. I attempted to discuss with Mr. Rion and the Court about the fact --

1 THE COURT: Well, let the record reflect
2 that you did.

3 MRS. KOHLRIESER: Yes, I did.

4 THE COURT: You did mention that Mr.
5 Enyart might be a witness.

6 MRS. KOHLRIESER: I specifically said
7 that to explain how it happened that he got in there so it wouldn't look like the
8 State had anything to do with that.

9 THE COURT: Okay. You did. You did.

10 MRS. KOHLRIESER: As well as Mr.
11 Carter's statement to him afterwards apologizing and saying that he knew that
12 it was Upham, or, he knew that that was a witness and he should have said
13 something to him. So, that's why I was like, well, that may pose a problem. I
14 don't have any control of who -- what I was asking was for somebody -- well, I
15 said because he's in here.

16 THE COURT: No. You never mentioned
17 that.

18 MRS. KOHLRIESER: Well, I gestured
19 towards him, your Honor.

20 THE COURT: You do have control. You
21 could have asked that he be separated. I ordered a separation of --

22 MRS. KOHLRIESER: I guess I could have
23 asked you that, your Honor.

1 THE COURT: I ordered a separation of
2 witnesses. I expect the attorneys to be conscious of that. I don't know who
3 every witness is going to be. You did mention that Mr. Enyart might be a
4 witness. He was in here. He's a security officer. The record will reflect that
5 he's a Court security officer. It is -- it wasn't brought to my attention that he
6 should not be in here.

7 MRS. KOHLRIESER: I guess I did not use
8 those exact words, your Honor. I guess my apologies for not using those
9 exact words.

10 THE COURT: I mean, you don't have to
11 apologize. It is what it is.

12 MRS. KOHLRIESER: I guess what I'm
13 saying is I understand what the separation of witnesses is for. The only
14 testimony that I would be asking Mr. Enyart to give would be how it was that
15 he went about placing Mr. Carter in the cell, and his knowledge of the other
16 inmate in there, and then what Mr. Carter said to him afterwards, which has
17 nothing to do with what Stephen Upham or, quite frankly, any other witness
18 so far has testified to.

19 THE COURT: Okay.

20 MRS. KOHLRIESER: So, I don't think
21 there's a prejudice in that regard. I guess, again, I should have been more
22 direct. But, that was what I was attempting to convey to the Court was that
23 Mr. Enyart was here, but we were probably going to have to call him as a

1 witness.

2 THE COURT: Okay. I don't know if that
3 was on the record or not. But, you did. I'll put on the record that you did
4 mention that. Mr. Rion?

5 MR. RION: Your Honor, I would object. I
6 would object.

7 THE COURT: On what grounds?

8 MR. RION: One, that he was in the room
9 and, two, really the relevance of it at this point. We have -- the testimony
10 elicited was that it was an accident already. There's really no -- it's not going
11 to be argued. There's going to be no evidence that it was purposely done or
12 anything like that. So, we're past that. There's no real probative value of it.
13 Again, if he was in the room during the testimony of a relevant witness, I
14 mean, that's what the Order deals with. It was not brought to my attention
15 that that witness was in the room during Upham's testimony. So, I didn't --
16 you know, this is moving so fast here and I'm trying to figure out who is who.
17 So, I wasn't aware that there was an officer who was going to be a witness
18 sitting in the Courtroom. So, it's not like I saw it and was just like, okay, I just
19 won't say anything. I didn't know. The government clearly knew that that
20 witness was sitting in the room and did nothing to specify at least during
21 Upham's testimony that that person was in the room. So, I would ask that he
22 be excluded, one, because he's a minor witness and, two, that it was a
23 violation and, three, I don't know, Mr. Carter was in custody at that point and

1 so do we have to have a Motion to Suppress hearing on whether the
2 statements made to a law enforcement officer could be used. I haven't
3 interviewed my client on that issue as to whether or not that statement was a
4 custodial statement.

5 THE COURT: Okay.

6 MRS. KOHLRIESER: Your Honor, could I
7 just address a couple of things?

8 THE COURT: Yes.

9 MRS. KOHLRIESER: Number one, I
10 believe Mr. Enyart's testimony in that regard will be that it was a spontaneous
11 statement made to him by Mr. Carter and not anything that he asked Mr.
12 Carter as to that.

13 As to the other part, while Mr. Rion was standing there I gestured
14 specifically, in the same manner I'm doing now, to Deputy Enyart who has
15 been here multiple times and has a name tag on and has sat six feet from Mr.
16 Rion throughout many of these proceedings. But, he is absolutely right,
17 because the way things are moving so quickly, again, it wasn't any intentional
18 thing on my part. I tried to draw it to the Court's attention. Clearly, I did that
19 poorly. But, --

20 THE COURT: Okay. Let me take it under
21 advisement and I'll let you know before one o'clock.

22 MRS. KOHLRIESER: Okay.

23 THE COURT: Oh, no. I said twelve-thirty.

1 MRS. KOHLRIESER: Oh, twelve-thirty.

2 THE COURT: Okay. Let's have a recess

3 for everybody.

4 (WHEREUPON, COURT WAS IN RECESS FOR LUNCH BREAK.)

5

6 (WHEREUPON, VOLUME SEVEN CONCLUDED.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23